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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 675

GREAT COVE REALTY CO., INC., and DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, made and entered on December 31, 1959, affirming the order and judgment of the County Court of Suffolk County, State of New York, made and entered on March 4, 1955, which adjudged appellants to be intruders upon lands owned and occupied by the Shinnecock Indian Tribe and directed the issuance of a warrant for their removal; the Court of Appeals of the State of New York having by its order made and entered on July 8, 1960 denied appellants' application for leave to appeal to that Court from the said order and judgment of the Appellate Division.

The judgment and order appealed from were rendered following a prior order made by the Court of Appeals of the State of New York on July 8, 1959, which reversed an earlier order of affirmance rendered by said Appellate Division on July 1, 1957 and remitted the matter to the Appellate Division for further consideration.

This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the County Court of Suffolk County is reported in *Matter of District Attorney, Suffolk County*, 207 Misc. 114, 137 N. Y. S. 2d 570. The opinion of the Appellate Division rendered on the occasion of its prior order of July 1, 1957 is reported in *Matter of Brenner (Great Cove Realty Co., Inc.)*, 4 A. D. 2d 749, 165 N. Y. S. 2d 143. The opinion of the Court of Appeals rendered on the appeal from the latter order is reported in *Matter of Brenner* v. *Great Cove Realty Co.*, 6 N. Y. 2d 435, 160 N. E. 2d 826. The opinion rendered by the Appellate Division on the occasion of making the order and judgment here appealed from is reported in *Matter of Brenner* v. *Great Cove Realty Co.*, 9 A. D. 2d 948, 195 N. Y. S. 2d 935. No opinion was rendered by the Court of Appeals on the occasion of its denial of appellants' application for leave to appeal to that Court. Copies of the opinions rendered by the Courts below are attached hereto as Appendix A.

Jurisdiction

This proceeding was instituted by the appellee, Harry C. Brenner, as District Attorney of Suffolk County, New York, on behalf of the Shinnecock Tribe of Indians, as a summary special proceeding pursuant to Section 8 of the Indian Law of the State of New York, to secure a war-

rant directing the removal of appellants and others as "intruders" on lands claimed to be part of a reservation owned or occupied by the said Indian Tribe. Appellants' contention that the State statute, as interpreted and applied by the New York Courts in this case, was repugnant to the Constitution and Laws of the United States, was rejected by the New York Courts, and the validity of the statute upheld.

The appeal herein is taken from the final order and judgment of an intermediate State appellate court—the Appellate Division—which is that of the highest Court of the State of New York in which decision could be had, since the Court of Appeals, the highest of that State, denied appellants' application for leave to appeal thereto. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 160; *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20-21.

The order and judgment of the Appellate Division was entered on December 31, 1959; a motion for reargument was denied by that Court on March 14, 1960; and the Court of Appeals denied appellants' application for leave to appeal to that Court by order made on July 8, 1960. The notice of appeal to this Court was filed in the County Court of Suffolk County, State of New York, where the record reposes, on October 4, 1960, within ninety days from the date of the order of the Court of Appeals denying leave to appeal (Transcript of Record, pp. 980-986). By order made on November 23, 1960, pursuant to Rule 13 of the Rules of this Court, by Hon. George J. Beldock, one of the Justices of the said Appellate Division, the time of the appellants to docket the case on this appeal, and to file the record thereof, with the Clerk of this Court, was extended to and including February 1, 1961 (Transcript, pp. 987-994).

The jurisdiction of the Supreme Court to review the decision herein by direct appeal is conferred by Title 28,

United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the order and judgment herein on direct appeal: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *La Crosse Tel. Corp. v. Wisconsin Board*, 336 U. S. 18; *Largent v. Texas*, 318 U. S. 418.

Statutes Involved

The full text of Section 8 of the New York Indian Law (N. Y. Laws 1909, ch. 31, § 8; McKinney's Consolidated Laws of New York Annotated, Book 25, § 8), the statute the validity of which is here involved, as it read at the time of the institution of the instant proceeding, is as follows:

> "§ 8. *Intrusions on tribal lands.*
>
> Except as otherwise provided by law, no person shall settle or reside upon any lands owned or occupied by any nation, tribe or band of Indians, except the members of such nation, tribe or band; and any lease, contract or agreement permitting such residence shall be void. The county judge of the county in which such lands are situated, upon complaint made to him, of such illegal residence, shall, if he thinks there is reasonable ground therefor, issue a notice directed to the person against whom complaint is made, requiring him to appear before such judge at the time and place therein specified, to answer the complaint. Such judge shall attend at the time and place mentioned in the notice, and upon proof of the personal service of such notice, shall take proof of the facts alleged in the complaint, and shall determine whether such person is an intruder upon the lands of such reservation. If he shall determine that such person is an intruder, he shall issue a warrant to the sheriff of the county commanding him, within ten days after the receipt thereof, to remove such person from such lands. If such judge shall determine that such person has been removed from such lands on a previous occasion, he shall issue his warrant

commanding the sheriff, within ten days from the receipt thereof, to remove such person and commit him to the county jail for the space of thirty days, without being entitled to the limits or the liberties of such jail; and such judge shall cause such conviction to be drawn up and filed in the office of the county clerk, which conviction shall be final. In the execution of either of such warrants the sheriff shall have the same powers as in the execution of criminal process, and shall be paid by the state such compensation as the comptroller shall certify as reasonable. The district attorney of any county in which reservation lands are situated, upon the written application of a majority of the chiefs, councilors or head men of the nation, tribe or band owning and occupying such lands, shall make complaint of any intrusions on such lands, and cause the intruders to be removed."

The other statutes here involved are 25 U. S. C., Section 233, added by 64 Stat. 845, Act September 13, 1950, ch. 845, § 1, effective September 13, 1952; and Section 5 of the New York Indian Law, as added by New York Laws 1953, ch. 671.

25 U. S. C., Section 233, so far as here pertinent, reads as follows:

"§ 233. *Jurisdiction of New York State Courts in Civil Actions.*

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: Provided * * *. *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on

any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

Section 5 of the New York Indian Law reads as follows:

"§ 5. *Actions in state courts.*

"Any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings."

Questions Presented

The questions presented by this appeal are as follows:

In so far as Section 8 of the Indian Law of the State of New York has been interpreted by the Courts of that State in this case as empowering the local County Court to adjudicate disputed questions of title or right of possession affecting lands claimed to be owned by an Indian Tribe, such as the Shinnecock Tribe, in a special summary proceeding instituted on behalf of the Indian Tribe by the local District Attorney, in which there is no right of trial by jury:

(1) Is the New York statute unconstitutional as impinging upon the paramount jurisdiction of the United

States as respects the affairs of such Indian Tribe, particularly as conferred by Article I, Section 8, first, third and eighteenth clauses, and Article II, Section 2, second paragraph, of the United States Constitution, and as exceeding the jurisdiction of the State of New York and its Courts in the absence of legislation by the Congress of the United States specifically authorizing the exercise of such jurisdiction by the State or its Courts?

(2) Is the New York statute unconstitutional under Article VI, second paragraph, of the United States Constitution, as in conflict with Section 233 of Title 25 of the United States Code, added by 64 Stat. 845, Act of September 13, 1950, chapter 845, Section 1, effective September 13, 1952?

(3) Is the New York statute unconstitutional under Amendment XIV, Section 1, to the United States Constitution, as denying appellants the equal protection of the laws, or as depriving them of their property without due process of law?

(4) Does the New York statute exceed the permissible scope of the State's police power in respect of Indian Tribes within the State's boundaries, now that the State Courts have so greatly broadened the prior narrow interpretation on the basis of which an earlier version of the statute was previously upheld by this Court in *State of New York* v. *Dibble*, 62 U. S. 366, it having been held under the prior interpretation that the statute applied only to lands indisputably owned by an Indian Tribe and that in such a situation it was a valid exercise of the State's police power for the preservation of the peace to provide a summary procedure for the removal of intruders from such lands?

Statement of Case

This proceeding, brought by the local District Attorney under a statute which provided a summary procedure for removing "intruders" from Indian reservation lands, in

which trial by jury was not available, developed into a closely contested trial of questions of title and right of possession revolving about certain deeds exchanged between the Shinnecock Indian Tribe and appellants' predecessors in title in 1859.

The nature of the dispute between the parties was succinctly set forth in the opinion rendered by the majority of the New York Court of Appeals on the first appeal taken to that Court in this litigation (*Matter of Brenner v. Great Cove Realty Co., Inc.*, 6 N. Y. 2d 435, 438-9), as follows:

> "The proceeding involved a 9-acre triangular parcel fronting on the southerly side of Montauk Highway. Appellants claimed title to this land and were in the process of erecting houses for the purpose of settling and residing thereon. In order to determine whether or not appellants were intruding upon Indian land, it was necessary for the County Court to consider chapter 46 of the Laws of 1859, and two deeds executed in accordance with that enactment.
>
> "Pursuant to the statute and deeds, all land north of 'an established and well defined' line running along an Indian ditch was granted by the Trustees of the Shinnecock Tribe to the Trustees of the Town of Southampton, and all land south of that line was granted by the latter to the former. The dividing boundary line was described as 'commencing at the head of the creek on the east side of said [Shinnecock] Neck, and *running along the Indian ditch*, where the fence now stands, to the Stephen Post meadow, so called; thence along the old ditch on the south side of the said meadow to old Fort Pond, where the water fence formerly stood'. (L. 1859, ch. 46, § 1; emphasis supplied.)
>
> "Appellants' claimed source of title to the disputed parcel stemmed from a deed to a large tract, recorded in 1861, from the town trustees to appellants' predecessors in title. The parties stipulated that that deed conveyed 3,200 acres and included 'the land lying immediately to the north of the Indian

> Ditch'. The issue, as framed by the County Court, was: 'Where was the old Indian Ditch mentioned in the legislation of 1859 located when the above conveyances were exchanged?' Petitioner sought to prove that the ditch ran completely along the southerly shoulder of an old sand road that is now Montauk Highway. Appellants, on the other hand, contended that the old Indian ditch started at an easterly point along Montauk Highway and then veered off at an angle in a southwesterly direction until it reached a point some 340 feet south of the highway. A total of 24 witnesses testified, and a mass of documentary evidence was introduced."

At the close of the entire case, upon the trial in the County Court, appellants moved to dismiss the petition on the ground, *inter alia*, that the proof clearly established that the Court had no jurisdiction of the matter (Transcript of Record, p. 794, fol. 2382). In support of their contention on the issue of jurisdiction, appellants urged that under the decision in *People ex rel. Cutler* v. *Dibble*, 16 N. Y. 203, aff'd 62 U. S. 366, Section 8 of the Indian Law could be invoked only if the lands claimed to be intruded on were "indisputably" part of an Indian reservation, and that where, as in the case at bar, the evidence disclosed a dispute on that issue, the summary remedy provided for by that statute was not available and could not be applied without violating appellants' constitutional rights (Transcript, pp. 814-815, fols. 2440-2444; pp. 815-816, fols. 2445-2447; p. 817, fols. 2450-2451; pp. 818-819, fols. 2452-2456).

Appellants' position was cogently set forth in the dissenting opinion rendered in the Court of Appeals by Judge (now Chief Judge) Desmond (6 N. Y. 2d at 444-6), as follows:

> "First enacted as chapter 204 of the Laws of 1821, the statute which is now section 8 of the New York Indian Law prescribes a summary procedure for ousting from 'lands owned or occupied by any nation, tribe or band of Indians' in this State any

intruders, that is, any persons attempting to settle or reside on such lands 'except the members of such nation, tribe or band'. In *People ex rel. Cutler v. Dibble* (16 N. Y. 203, affd. 62 U. S. 366) the purpose of such a proceeding was authoritively stated as being 'to remove intruders from what are indisputably the ungranted lands of the state, or the reservations of the Indian tribes' (16 N. Y., p. 214). The holding of this court in the *Dibble* case, never since questioned, was that 'the order of removal adjudicates upon no claim, and determines no right or title, but leaves the party removed to the usual remedies to assert and establish any title to the *locus in quo* which he may deem himself to possess' (same page). The lower court *Dibble* decision (18 Barb. 412) which this court affirmed had said (pp. 415-416) that, in order to give a County Judge jurisdiction of such a removal proceeding, 'it must appear, undoubtedly, that the intrusion was upon indian lands, that is, lands belonging to or occupied by a nation or tribe of indians'. The United States Supreme Court, affirming this court in *Dibble*, declared that 'The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace' (62 U. S., p. 370). Every other authority, early or late, construes the *Dibble* case as holding that a section 8 proceeding is purely a summary one whereby the State exercises its police power to keep the peace on Indian lands (see 'Federal Indian Law', U. S. Dept. Interior, 1958, p. 314, n.; 27 Am. Jur., Indians, § 48, pp. 572-573; 42 C. J. S., Indians, § 72, p. 784; Judge Pound in 22 Col. L. Rev. 97-99; *People ex rel. Ray v. Martin*, 294 N. Y. 61, 72, 73; *Matter of Stakel* [*Blueye*], 281 App. Div. 183, affd. 306 N. Y. 679; *Matter of Fischer* [*Checkman*], 283 App. Div. 518; *Matter of Herne*, 133 Misc. 286).

"Despite all this, the County Court in the proceeding here under review undertook to decide a question of title as between the Shinnecock Indians and the defendant corporations which had built houses on the lands in dispute. The dispute which made its appearance at the trial of this section 8 proceeding was as to the boundary line of premises to which these defendants held title. When it thus

became apparent that this was no matter of removing squatters from undisputed Indian lands but an actual dispute as to ownership, the County Judge should have dismissed the proceeding as being unavailable for such a purpose. Instead, the court denied defendants' motion on this jurisdictional ground for dismissal, and undertook to settle the contest as to boundary and title by making an order describing the land in litigation as being 'owned and occupied' by the Shinnecock Tribe on whose behalf the District Attorney of Suffolk County (see § 8) had brought the proceeding. The Appellate Division affirmed, adopting from the *Dibble* opinion in this court the statement that the order 'does not determine right or title in the land [but] leaves the parties * * * to the usual remedies to assert and establish * * * title'.

"We agree with the Appellate Division that no section 8 order can determine the ownership of land which is in dispute between an Indian Tribe and other persons. However, it follows from this that the Appellate Division, instead of affirming, should have reversed the County Court order and should have dismissed the proceeding, leaving the parties to the 'usual remedies' to which the Appellate Division referred."

The majority of the Court of Appeals, nevertheless, held that the County Court had jurisdiction to determine the disputed issues of title and right of possession as between appellants and the Shinnecock Indian Tribe, and remitted the proceeding to the Appellate Division to determine those questions. The Appellate Division, while affirming the final order of the County Court adjudging appellants to be intruders upon lands owned and occupied by the Shinnecock Indian Tribe, had stated in its opinion, in reliance on the *Dibble* decision, that the County Court order did "not determine right or title in the land" and "leaves the parties who are removed from the land in question to the usual remedies to assert and establish any title to the land which they deem themselves to possess" (4 A. D. 2d 749).

Taken by surprise by the action of the majority of the Court of Appeals overruling the prior decision in *People ex rel. Cutler v. Dibble, supra*, appellants made a motion for reargument in the Court of Appeals, in which they urged that in so far as Section 8 of the Indian Law was interpreted by a majority of the Court of Appeals as empowering the local County Court to adjudicate disputed questions of title or right of possession affecting lands claimed to be owned by an Indian Tribe, such as the Shinnecock Tribe, in a special proceeding instituted on behalf of the Indian Tribe by the local District Attorney, the New York statute was unconstitutional as impinging upon the paramount jurisdiction of the United States as respects the affairs of such Indian Tribe, and as exceeding the jurisdiction of the State of New York and its Courts in the absence of legislation by the Congress of the United States specifically authorizing the exercise of such jurisdiction by the State or its Courts (see appellants' motion for reargument to the Court of Appeals dated October 5, 1959, and returnable before that Court on October 12, 1959; Transcript of Record, pp. 875-888)). Appellants pointed out that their position was confirmed by a recent Federal enactment, which was cited in Judge Desmond's dissenting opinion; namely, 25 U. S. C., Section 233, added by 64 Stat. 845, Act of September 13, 1950, ch. 845, Section 1, effective September 13, 1952, and that that statute, as well as a new Section 5 of the Indian Law enacted by the New York Legislature in 1953 (Laws 1953, ch. 671), pursuant to the Federal legislation, were inapplicable to the case at bar (*Id.*, pp. 883-887).

Though the issue thus raised by appellants had not previously been specifically urged, prior decisions of the New York Court of Appeals make it clear that since the question posed was one of jurisdiction it was never waived and could be raised at any stage of the litigation. *People ex rel. Ray v. Martin*, 294 N. Y. 61, 65, aff'd 326 U. S.

496; *Meyers v. American Locomotive Co.*, 201 N. Y. 163, 166; *Buckles v. State of New York*, 221 N. Y. 418; *Shea v. Export S.S. Corp.*, 253 N. Y. 17, 21.

Indeed, both the majority and the minority of the Court of Appeals had in their respective opinions recognized this fundamental proposition (6 N. Y. 2d at 442, 447).

The motion for reargument was denied by the Court of Appeals without opinion on November 19, 1959 (7 N. Y. 2d 805). By order made on December 31, 1959, the Appellate Division, without hearing further argument by the parties and without the submission of any new briefs, made an order unanimously affirming the order of the County Court. In a memorandum decision the Appellate Division stated that in its opinion the County Court's finding "on the disputed question of title was not against the weight of the credible evidence" (9 A. D. 2d 948, 949).

Appellants thereupon made a motion for reargument in the Appellate Division, wherein they again urged the question of jurisdiction which they had advanced on the prior motion for reargument in the Court of Appeals (Transcript, pp. 895-902, 906, 911-916). That motion was denied without opinion by the Appellate Division by order made on March 14, 1960 (Transcript, pp. 963a-963b).

Appellants thereupon made a motion in the Court of Appeals for leave to appeal to that Court (Transcript, pp. 937-978). On that motion they again urged that, in so far as Section 8 of the Indian Law was interpreted as empowering the Courts of this State to adjudicate questions of title affecting lands claimed to be owned by Indian Tribes, it impinged upon the exclusive jurisdiction of the Federal Government as respects the affairs of such tribes, and was not authorized by the pertinent Federal legislation (25 U. S. C. §233; Transcript, pp. 962-967). They further pointed out that since the question posed was one of jurisdiction it was immaterial that it was not raised on the prior appeals, either in the Appellate Division or in the Court of Appeals (*Id.*, p. 962).

The motion for leave to appeal was denied by the Court of Appeals without opinion on July 8, 1960 (Transcript, p. 979). Under the practice of the Court of Appeals, that Court would have denied the said motion for leave to appeal on the ground that appeal lay as a matter of right, if it had deemed the question presented to be a substantial constitutional question, such as to entitle appellants to an appeal as of right. (*E.g., Matter of Brenner v. Great Cove Realty Co.*, 4 N. Y. 2d 779; *Bowery Savings Bank v. Carucci*, 296 N. Y. 616; see Cohen and Karger, "The Powers of the New York Court of Appeals" (Rev. Ed. 1952), pp. 352, 426.)

The New York decisions cited above establish that the question with regard to the jurisdiction of the New York Courts was timely raised, both on the motions for reargument in the Court of Appeals and in the Appellate Division, as well as on the motion for leave to appeal to the Court of Appeals. The fact that the Court of Appeals unconditionally denied the motion for leave to appeal after it had denied the prior motion for reargument on the same question shows that the Court necessarily decided against appellants' contention on the question of jurisdiction.

Furthermore, as noted above, the interpretation applied by the Court of Appeals to Section 8 of the Indian Law, so as to extend it to cases involving disputed questions of title or right of possession, in disregard of its own prior decision in *People ex rel. Cutler v. Dibble, supra,* was completely unexpected and came as a surprise to appellants. Under the decisions of this Court, the Federal question presented by the State Court's reversal of its own prior interpretation of the statute was, accordingly, timely raised on the motion for reargument addressed to the Court of Appeals. See *Great Northern Ry. Co. v. Sunburst Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 677-8; *Missouri v. Gehner*, 281 U. S. 313, 320; see also Stern and Gressman, "Supreme Court Practice" (2nd ed., 1954), pp. 89-90.

The Questions are Substantial

The basic question presented by this appeal is whether a State has jurisdiction, through its Courts, to pass upon disputed questions of title or right of possession affecting lands claimed to be owned by an Indian tribe, in the absence of legislation by the Congress of the United States specifically authorizing the exercise of such jurisdiction. As noted above, that question was timely raised (a) on the motion for reargument in the Court of Appeals, (b) on the motion for reargument in the Appellate Division, and (c) on the motion for leave to appeal in the Court of Appeals. By their denial of those motions, the State Courts necessarily decided the question adversely to appellants' position.

The Federal Government, acting through Congress, is charged with the paramount responsibility and authority for regulation of the affairs of the various Indian tribes in this country (U. S. Const., Art. I, Sec. 8, 1st, 3rd and 18th clauses; *Worcester* v. *Georgia*, 31 U. S. 515; *United States* v. *Waller*, 243 U. S. 452, 459; see *People ex rel. Ray* v. *Martin, supra*, 294 N. Y. 61, 69, affd. 326 U. S. 496). The basic principle of *Worcester* v. *Georgia, supra*, barring the applicability of State law to an Indian tribe without the consent of the United States has been modified only "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized" (see *Williams* v. *Lee*, 358 U. S. 217, 219).

It is submitted that the rights of an Indian tribe in lands occupied or claimed by it are of such a fundamental nature that in the absence of enabling Congressional legislation a State has no power to confer jurisdiction upon its Courts to adjudicate upon such rights or claims, beyond the limited jurisdiction that it may possess in the exercise of its police power to keep the peace on Indian lands.

In *People ex rel. Cutler* v. *Dibble*, *supra*, 16 N. Y. 203, affd. *sub nom. State of New York* v. *Dibble*, 62 U. S. 366, the

statutory forebear of Section 8 of the New York Indian Law was upheld as constitutional by this Court on the theory that it was "a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace" (62 U. S. at 370). As interpreted by the New York courts in the *Dibble* case, however, the statute was of an extremely limited scope. In applying the statute to the situation before it, the New York Court of Appeals thus made it clear that it was dealing only with a situation in which it "indisputably appeared" that the lands involved were part of an Indian reservation, that there was no issue "in respect to the right of occupancy and possession", and that the purpose of the statute was "simply" to remove an "intruder * * * from a place where he could not possibly have any legal right to be" (16 N. Y. at 214; *id.*, dissenting opinion, at 218). It was in that context that this Court upheld the validity of the statute, stating as follows (62 U. S. at 370):

> "The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of the State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the Constitution of the United States."

The *Dibble* case involved certain reservation lands owned by the Seneca Nation of Indians within the geographical limits of the State of New York, which reservation lands had been declared to be the property of the Seneca Nation by a treaty between that nation and the United States

entered into in 1794. Pursuant to certain later treaties entered into between the Seneca Nation and the United States in January, 1838, and May, 1842, the Seneca Nation agreed to sell one of its reservations, known as the Tonawanda Reservation, to two white persons named Ogden and Fellows, upon certain terms and conditions. Article IV of the 1842 treaty provided for the appointment of arbitrators to determine the amount to be paid to each individual Indian out of the purchase price, and Article V of the treaty provided that possession of the land in question was to be surrendered and delivered up to Ogden and Fellows, within certain specified periods after the filing of the report of the arbitrators in the office of the Department of War.

It appeared that the defendants in the *Dibble* case claimed as grantees of Ogden and Fellows, but that they had entered on the lands of the Tonawanda Reservation before the award and determination provided for by Article IV of the treaty had been made and filed. A proceeding was brought under the statutory forebear of Section 8 of the Indian Law for the summary removal of such persons as intruders upon the Indian lands. Notice of the complaint was served upon them, and they appeared and objected to the proceedings on various grounds, including a challenge to the constitutional validity of the statute pursuant to which the proceeding was brought. It was urged that the summary remedy provided by the statute was in violation of the defendants' right of trial by jury and also contravened the guaranty of due process of law. The New York Court of Appeals rejected those contentions, but in doing so emphasized that the statute was intended only to cover a situation in which there was no issue as to the Indian Tribe's right of occupancy and possession.

The Court emphasized that the settled policy was "to prevent individual citizens from acquiring any title to and from entering upon and appropriating their [Indian] lands unless by such means and under such regulations

as the Government chose to prescribe", and that individual citizens would not be permitted "to obtain possession of their [Indian] lands, under any claim or pretense whatever, without the sanction of the Government" (16 N. Y. at 213). The Court accordingly concluded that "The citizen who enters upon their [Indian] lands before their title has been extinguished, and they have been removed by the act or approbation of the Government, acquires no such rights of property or possession as are contemplated by the sections of the constitution referred to" (16 N. Y. at 213.) The Court, however, made it clear that it was dealing only with a situation in which it "indisputably" appeared that the lands involved were part of an Indian reservation and that there was no issue "in respect to the right of occupancy and possession". The Court thus stated (at p. 214):

> "It [the State] is under no constitutional or other obligation to wait the judicial determination of the courts to remove intruders from what are *indisputably* the ungranted lands of the state, or the reservations of the Indian tribes. The moment the intrusion is made out, and the nature of the territory intruded upon appears, *there is nothing to be tried, and nothing for the courts to determine, in respect to the right of occupancy and possession.* Besides, the order of removal adjudicates upon no claim, and determines no right or title, but leaves the party removed to the usual remedies to assert and establish any title to the *locus in quo* which he may deem himself to possess." (Emphasis supplied.)

In a dissenting opinion, in which he, however, agreed with the majority of the Court on the issue of the constitutionality of the statute, Chief Judge Denio gave even more explicit expression to the interpretation applied by the majority to the statute in sustaining its validity. He stated (16 N. Y. at 217-218):

> "If it were true that a citizen might be deprived of the title to his own land, or of the possession of it, on the pretence that it was Indian land and that

he was an intruder, without an opportunity of contesting that allegation before a jury, according to the course of the common law, I should not hesitate to declare that the act was a violation of the provision which guarantees a trial by jury in all cases in which it has been heretofore used. But such a consequence could never follow from the legal operation of the act. The Indian reservations were well defined and notorious portions of the territory of the state. It was the dictate of a prudent and just policy to guard the Indians from the injurious consequence likely to arise from the intrusion of the white population into the reserved districts in which they resided. Hence a peculiar jurisdiction was given to the local magistrate, to hear complaints of intrusions into these districts and to issue summary process for the expulsion of the intruders. Under the first section of the act, which it is alone necessary to examine, there was to be no conviction for an offence and no punishment; and no judgment moreover, of a civil nature. *The intruder was simply to be removed from a place where he could not possibly have any legal right to be.* It is suggested that a citizen living upon his own farm might be ejected from it, under this act, upon the pretence that it was within an Indian reservation, and that this question might be determined against him in a summary proceeding; but the magistrate would be wholly without jurisdiction unless the place from which the party was removed was land owned or occupied by an Indian tribe. It is not a case in which he could acquire jurisdiction by his own determination of the fact upon which that jurisdiction depended. No person could be subject to proceedings under the act unless he resided upon Indian lands. * * *." (Emphasis supplied.)

Chief Judge Denio further stated (at p. 220):

"The proceeding is in its theory, a police regulation for preserving the Indian reservation from the intrusion of the white people. It would have been competent for the legislature to charge the sheriff of the county, or the colonel of the nearest regiment

> of the militia, with the duty of seeing that the Indians were not intruded upon, and of removing all white persons found on their lands. * * *."

The majority of the New York Court of Appeals made it clear that there were no questions of fact presented, and that it had been previously conclusively determined in *Blacksmith* v. *Fellows*, 7 N. Y. 401, affd. 19 How. (U. S.) 366, involving the same tract of land and the same treaties, that the grantees' right of possession was subject to the condition precedent of the making and filing of the arbitrators' award, and that in any event the grantees had no right to secure possession except through the action of the United States Government (16 N. Y. at 215-16, 217).

It is one thing to hold that the State may employ a summary intruder-removal proceeding, such as that of Section 8 of the New York Indian Law, in the exercise of its police power to preserve peace and order on Indian lands, where, as in the *Dibble* case, *supra*, "there is nothing for the courts to determine, in respect to the right of occupancy and possession", and it is sought simply to remove an "intruder * * * from a place where he could not possibly have any legal right to be" (*People ex rel. Cutler* v. *Dibble*, *supra*, 16 N. Y. at 214, 218). By removing such an intruder the State, through its courts, is merely exercising its police power to preserve peace and order on what are indisputably Indian lands.

The situation, however, is entirely different where, as in the case at bar, there are issues "to be tried, and * * * for the courts to determine, in respect to the right of occupancy and possession" (cf. *People ex rel. Cutler* v. *Dibble*, *supra*, 16 N. Y. at 214). In the latter situation, where there is an actual title or boundary dispute, there is no occasion for invocation of the State's police power to deal with emergency situations in order to preserve peace and order. In such a case, it is submitted, the disposition of the Indians' claimed property rights is a matter to be regulated

by Congress, as the paramount guardian of the interests of the Indian tribes.

Federal concern with the protection of the property rights of Indian tribes finds concrete expression in 25 U. S. C., Section 177, which provides as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *."

It has been observed that "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent." (See, *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U. S. 99, 119.)

It has thus been held that a State Court judgment, rendered in an action in which the United States was not represented, as a party or otherwise, was not effectual to deprive an Indian tribe of real property rights or claims. *United States* v. *Candelaria*, 271 U. S. 432, 443, where this Court stated:

> "The Indians of the pueblo are wards of the United States and hold their lands subject to the restriction that the same cannot be alienated in any-wise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. * * *"

So in the instant case, the dispute turns on a deed given by the Shinnecock Indian tribe in 1859 pursuant to State

legislation. Under the *Candelaria* decision, *supra*, the State Courts could not render an effectual judgment adjudicating adversely to the Indian tribe's claims of title and right of possession. In the face of that restriction, the State Courts could certainly not be regarded as vested with plenary jurisdiction to pass upon disputed questions of title or right of possession affecting lands claimed to be part of an Indian reservation.

The general proposition that the State Courts lack jurisdiction to pass upon such disputed questions, in the absence of specific enabling legislation by Congress, is confirmed by the recently enacted 25 U. S. C., Section 233, set out above (pp. 5-6), which for the first time conferred general jurisdiction on the courts of the State of New York in civil actions and proceedings affecting Indians.

The House Committee Report accompanying the bill which culminated in 25 U. S. C., Section 233, stated that the Indian tribes in New York had reached such an advanced stage in their development as to be "in no further need of governmental supervision or control." See U. S. House Report No. 2720, 81st Cong., 2nd Sess., 1950.

The Senate Committee Report (No. 1836 of Senate Committee on Interior and Insular Affairs, 81st Cong., 2nd Sess., June 15, 1950), stated in part as follows (p. 2):

> "The Indian reservations in the State of New York have never been owned by the United States. They were not set up under any treaty made with the United States. They were not set up under any act of Congress or Executive order. The United States has never had over them any powers except those that were ceded by the State in ratifying the Constitution of 1789. Hence the Government's relation to them is principally a general guardianship, and that is in a somewhat peculiar situation, as the State of New York also has exercised—in fact, has been most active in exercising—its wardship over these Indians. *But State law cannot be invoked, be-*

> *cause State law does not apply to the Indians except so far as the United States has given its consent.*" (Emphasis supplied.)

The Senate Committee Report (p. 3) referred to a resolution of a Joint Legislative Committee on Indian Affairs of the New York State Legislature urging the enactment of the legislation in question. The latter report (New York Legislative Documents, 1948, Vol. 9, Rep. No. 64) emphasized the need for the legislation, in view of the decision rendered in *United States* v. *Forness*, 125 F. 2d 928 (2nd Cir.), cert. den. 316 U. S. 694, where it was held that the provisions of New York law governing the enforcement of real property rights did not apply to an Indian tribe except so far as the United States had given its consent thereto. The Joint Legislative Committee (*id.*, p. 5) expressed the view that application of the *Forness* decision "to civil disputes would further mean that no court of the State of New York has power to render judgment against a reservation Indian".

Both the Federal and New York Courts have recognized that the paramount authority of the Federal Government is applicable to the Indian tribes in New York, as well as to those elsewhere in the country. See *People ex rel. Ray* v. *Martin, supra*, 294 N. Y. at 69; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 889, 891 (2nd Cir.), cert. den., 358 U. S. 841, reh. den. 360 U. S. 923. In the latter case it was pointed out that the New York Courts themselves had recognized that the Indians in New York "are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them" (257 F. 2d at 889). The Court further pointed out (at 891):

> "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land

> interests of the Indian tribes in New York in Title 25 U.S.C.A. § 233, pointed up and reaffirmed its paramount authority over Indian tribal lands."

Pursuant to the authority of the new 25 U. S. C. Section 233, the New York Legislature in 1953 enacted a new Section 5 of the New York Indian Law, set out above (p. 6), authorizing any action or special proceeding between Indians or between Indians and other persons to be "prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings". Presumably the newly enacted Section 5 was unauthorized prior to the passage of the enabling Congressional legislation.

The instant proceeding was not, however, brought pursuant to the new Section 5. If resort had been had to that Section, the remedy available would necessarily have been that "provided by law for actions and special proceedings" between non-Indian parties; namely, a plenary action brought by the Indian tribe in its own right to recover the possession of the land claimed to be owned by it, subject to the right of trial by jury and the procedure generally applicable to such plenary actions (cf. *City of Syracuse* v. *Hogan*, 234 N. Y. 457, 462; *Bryan* v. *McGurk*, 200 N. Y. 332, 337-8). In the situation at bar, on the other hand, the remedy invoked was not such a plenary action but a summary proceeding having a limited application to claims asserted on behalf of an Indian tribe, which was brought by the District Attorney on behalf of the Indian tribe rather than by the Indian tribe in its own right and in which the right of trial by jury and other procedures applicable to plenary actions were not available.

Since the enabling Congressional legislation authorized only the exercise of the jurisdiction provided for therein "to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings", it obviously did not empower the State of New York or its

Courts to exercise the special summary removal procedure provided for in Section 8 of the New York Indian Law.

Moreover, the jurisdiction conferred by the enabling Congressional legislation did not extend to the situation here presented, for the further reason that that legislation specifically referred in one of its provisos to the jurisdiction of the Courts of the State of New York "in civil actions involving Indian lands or claims with respect thereto", and stated that nothing therein contained should be construed as conferring jurisdiction on the New York Courts in such cases where they "relate to transactions or events transpiring prior to September 13, 1952" (25 U. S. C., 233).

Since the boundary dispute in this case turned on State legislation passed in 1859, and deeds exchanged in that year pursuant thereto, it would clearly appear to "relate to transactions or events transpiring prior to September 13, 1952" and would thus be excluded from the ambit of the Federal enabling legislation. To the extent that Section 8 of the New York Indian Law, as interpreted by the New York Courts in this case, purports to confer a broader jurisdiction on the New York Courts with respect to title disputes affecting Indian tribes, it is in conflict with the controlling Federal legislation on the subject and falls under the ban of Article VI, second paragraph, of the United States Constitution.

It is, accordingly, submitted that Section 8 of the Indian Law, as interpreted by the State Courts in this case (a) impinges upon the exclusive jurisdiction of the Federal Government, there being no Federal authorization for the exercise of such jurisdiction by the State of New York or its Courts, (b) exceeds the permissible scope of New York State's police power in respect of Indian tribes within the State's boundaries, and (c) is in conflict with the terms of the jurisdiction conferred on the State of New York by 25 U. S. C., Section 233, as adopted in 1950, effective September 13, 1952.

It is submitted that the New York Courts in this case erred in rejecting the foregoing challenges to the jurisdiction of the State of New York and its Courts, and that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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APPENDIX A

Opinions Rendered by the Courts Below

(1)

Opinions of the New York Court of Appeals (6 N. Y. 2d 435, 160 N. E. 2d 826)

In the Matter of HARRY C. BRENNER, District Attorney of the County of Suffolk, Respondent, against GREAT COVE REALTY CO., INC., *et al.*, Appellants, *et al.*, Respondents.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 7, 1957, which unanimously affirmed an order of the County Court of Suffolk County (Edgar F. Hazelton, J.; opinion 207 Misc. 114), adjudging that appellants are intruders on lands owned and occupied by the Shinnecock Indian Tribe at Southampton, in Suffolk County, and directing issuance of a warrant for the removal of said appellants.

FROESSEL, *J.* In a proceeding instituted by the District Attorney of Suffolk County pursuant to section 8 of the Indian Law, the County Court of Suffolk County adjudged that appellants were intruders upon lands comprising part of the Shinnecock Indian Reservation in Southampton, Long Island. The court directed the issuance of a warrant for their removal and delineated the boundaries of the "lands owned and occupied by the Shinnecock Tribe of Indians and affected by this determination".

The proceeding involved a 9-acre triangular parcel fronting on the southerly side of Montauk Highway. Appellants claimed title to this land and were in the process of erecting houses for the purpose of settling and residing thereon. In order to determine whether or not appellants were intruding upon Indian land, it was necessary for the County Court to consider chapter 46 of the Laws of 1859, and two deeds executed in accordance with that enactment.

Pursuant to the statute and deeds, all land north of "an established and well defined" line running along an Indian ditch was granted by the Trustees of the Shinnecock Tribe to the Trustees of the Town of Southampton, and all land south of that line was granted by the latter to the former. The dividing boundary line was described as "commencing at the head of the creek on the east side of said [Shinnecock] Neck, and *running along the Indian ditch*, where the fence now stands, to the Stephen Post Meadow, so called; thence along the old ditch on the south side of the said meadow to old Fort Pond, where the water fence formerly stood." (L. 1859, ch. 46, § 1; emphasis supplied.)

Appellants' claimed source of title to the disputed parcel stemmed from a deed to a large tract, recorded in 1861, from the town trustees to appellants' predecessors in title. The parties stipulated that that deed conveyed 3,200 acres and included "the land lying immediately to the north of the Indian Ditch". The issue, as framed by the County Court, was: "Where was the old Indian Ditch mentioned in the legislation of 1859 located when the above conveyances were exchanged?" Petitioner sought to prove that the ditch ran completely along the southerly shoulder of an old sand road that is now Montauk Highway. Appellants, on the other hand, contended that the old Indian ditch started at an easterly point along Montauk Highway and then veered off at an angle in a southwesterly direction until it reached a point some 340 feet south of the highway. A total of 24 witnesses testified, and a mass of documentary evidence was introduced.

The trial court resolved the disputed issue of fact in favor of petitioner. It found that the Indian ditch referred to in the 1859 statute and deeds ran along the southerly line of the old sand road and had been obliterated by the modernizing of Montauk Highway. The ditch which appellants claimed was the "Indian ditch" was found "to be

just another ditch with which the reservation is lined in several places". After a lengthy colloquy, the court also denied appellants' motion made at the very end of the case to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter of the proceeding.

Appellants urge on this appeal that "Section 8 confers a limited jurisdiction upon the County Court to award summary relief in certain special circumstances; i.e., where there is no dispute as to the Indian Tribe's ownership or right of possession as respects the particular land." Appellants contend further that where alleged intruders enter upon lands under color of title, and the evidence discloses a substantial dispute on the issue of ownership, the remedy provided by section 8 may not be invoked without violating their constitutional right to a trial by jury.

The constitutionality of the predecessor of section 8 (L. 1821, ch. 204) was upheld by this court and by the Supreme Court of the United States in *People ex rel. Cutler v. Dibble* (16 N. Y. 203, aff'd 62 U. S. 366). The *Dibble* case involved two treaties entered into in 1838 and 1842 between the United States Government and the Seneca Indian Nation. In these treaties, as outlined by the Supreme Court in *Fellows* v. *Blacksmith* (60 U. S. 366), the Seneca Nation conveyed four reservations in Western New York to two white persons named Ogden and Fellows, pursuant to certain terms and conditions—which included a determination by arbitrators of the amount to be paid, the apportionment thereof, and the filing of the arbitrators' report with the Department of War. The Seneca Nation agreed to remove to a new residence in the West within five years, with the financial aid of the United States Government. Neither treaty, however, made any provision as to the manner in which the Indians were to surrender possession.

The *Fellows* case involved an action of trespass against the grantees, who had forcibly taken possession of the

Tonawanda Reservation, one of the four conveyed. The Supreme Court held (60 U. S. *supra*, p. 372) that "the grantees derived no power, under the treaty, to dispossess by force these Indians, or right of entry, so as to sustain an ejectment in a court of law; that no private remedy of this nature was contemplated by the treaty, and that a forcible removal must be made, if made at all, under the direction of the United States."

In the *Dibble* case (*supra*), the defendants, who claimed title through Ogden and Fellows, entered into possession of the Tonawanda Reservation, and a proceeding was brought by the District Attorney, under the predecessor of section 8, to remove them as intruders. Although the statute, by its terms, did not then require it, defendants were notified of the institution of the proceeding. They appeared before the County Judge and challenged his jurisdiction "on the ground that they had entered and occupied the lands, claiming title under a written instrument adversely to the Seneca nation of Indians, and therefore, by the Constitution and laws of the State, they were entitled to a trial by jury, according to the course of the common law, and could not thus be removed by summary proceedings under this act." (62 U. S., p. 369.) This plea, which is identical to the one now being pressed by appellants, was overruled by the County Judge. The defendants then pleaded, on the merits, that title to the land and hence the right of possession was in them through the treaty conveyance to Ogden and Fellows.

This court held (16 N. Y., *supra*, p. 216): "The case of *Blacksmith* v. *Fellows* is decisive * * * against the claim of [defendants] to enter upon and occupy the lands *at present*" (emphasis supplied), and emphasized (pp. 215-216) that "it nowhere appears, nor was it pretended" that the conditions precedent to defendants' right of entry—the making and filing of the arbitration award—had occurred. Judge Brown, writing for the majority, made it clear at the outset of his opinion (16 N. Y., p. 211)—"I *decline to*

consider whether Olgen and Fellows obtained a good title to the lands known as the Tonowanda reservation, under the grant to them, and the treaties of January 15, 1838, and of May 20, 1842; because I think the rights of the relators to occupy the lands in controversy may be disposed of *upon other grounds.*" (Emphasis supplied.) Since only the United States Government had the right, under the treaties, to remove the Indians from their reservation, the defendants were ordered removed as intruders, regardless of the fact that they may have had good title to the lands.

In upholding the constitutionality of the statute, this court wrote, in part (16 N. Y., *supra*, pp. 213-214): "This right of summary removal is indispensably necessary to the protection of its [the State's] own property, and to enable the state to fulfill its duties and obligations to the remnants of the Indian tribes within its borders, who are too feeble and helpless to protect themselves. It is under no constitutional or other obligation to wait the judicial determination of the courts to remove intruders from what are indisputably the ungranted lands of the state, or the reservations of the Indian tribes. The moment the intrusion is made out, and the nature of the territory intruded upon appears, there is nothing to be tried, and nothing for the courts to determine, in respect to the right of occupancy and possession. Besides, the order of removal adjudicates upon no claim, and determines no right or title, but leaves the party removed to the usual remedies to assert and establish any title to the *locus in quo* which he may deem himself to possess." It will be noted that the last sentence referred to the order of adjudication in that case, which determined no title only because the court did not find it necessary to pass upon title.

Unlike the 1821 statute involved in the *Dibble* case (*supra*), present section 8 requires the County Court to "issue a notice directed to the person against whom com-

plaint is made" to appear and answer, and it is only after "proof of the personal service of such notice" that it is authorized to "take proof of the facts alleged in the complaint" (see, in this connection, Chief Judge DENIO's discussion in the *Dibble* case, 16 N. Y., pp. 218-220). Section 8 then commands the court to "determine whether such person is an intruder upon the lands of such reservation", and in order to do so it obviously must determine whether the land is in fact part of an Indian reservation. The court's jurisdiction to issue the warrant in the instant case depended upon whether the disputed parcel was Indian land, and it is settled beyond cavil that a court has jurisdiction to determine the facts upon which its jurisdiction depends (*Matter of United States of Mexico* v. *Schmuck*, 294 N. Y. 265, 271-273; *Consumers Lbr. Co.* v. *Lincoln*, 225 App. Div. 484, 485; *Stoll* v. *Gottlieb*, 305 U. S. 165, 171-172; *United States* v. *Mine Workers*, 330 U. S. 258, 289-295; 21 C. J. S., Courts, § 113). Furthermore, where a County Court is vested by statute with jurisdiction over a special proceeding, it has the same power in and over the proceeding as the Supreme Court (Civ. Prac. Act, § 69), including the jurisdiction to decide questions of title to real property (*Matter of Yarger* [*City of Albany*], 283 App. Div. 214, 218, affd. 308 N. Y. 864).

This court declined to pass upon the issue of title in the *Dibble* case (*supra*), not because it felt powerless to decide the issue but because it was not dispositive of the controversy. The court did in fact construe the far more solemn documents, the treaties, to determine whether defendants were intruders, just as the court here construed the description in the 1859 statute and deeds to determine the same issue. Appellants had a full dress trial on the issue of ownership, and their contention that the court was obliged to dismiss the proceeding as soon as the evidence showed a genuine dispute as to title to the parcel, is untenable.

As to the alleged constitutional right to a jury trial on the issue of title, we do not reach the merits of this claim, as appellants are estopped by their conduct from asserting it. At the very outset of the trial, it clearly appeared—by stipulation—that the principal issue in the case was a dispute as to ownership. Thereafter, upon the court's own inquiry, the defense attorney assured the court that his clients had no objection to the procedure pursued by the District Attorney. The court pointed out that it did not "want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised", and the defense attorney replied: "There is no question on that score on behalf of my defendants."

While it is well settled that parties may not by their consent confer jurisdiction over the *subject matter* on a court (*Meyers* v. *American Locomotive Co.*, 201 N. Y. 163, 166; *Shea* v. *Export S.S. Corp.*, 253 N. Y. 17, 21), the right to a trial by jury is a personal right which must be timely asserted. Since appellants consented to have the issue of ownership tried by a court of competent jurisdiction and participated actively on the merits, they cannot now be heard to complain (*Baird* v. *Mayor*, 74 N. Y. 382; *Security Discount Associates* v. *Weissbaum*, 283 App. Div. 920).

The error in the proceedings below, which requires a reversal, lies in the decision of the Appellate Division. The court specified in its order that it was affirming the order of the County Court "upon the opinion and decision slip of the court herein". In its opinion, the Appellate Division, relying upon the *Dibble* case (*supra*), held: "The order [removing appellants as intruders] does not determine right or title in the land. It leaves the parties who are removed from the land in question to the usual remedies to assert and establish any title to the land which they deem themselves to possess."

The order of the trial court, however, from each and every part of which appellants appealed, not only squarely

adjudged that the disputed parcel was part of the Shinnecock Indian Reservation, but went so far as to describe, by degrees, minutes and seconds, the boundaries of the lands "*owned and occupied* by the Shinnecock Tribe of Indians and affected by this determination" (emphasis supplied). By isolating the language used in the *Dibble* case from the context of the peculiar facts there involved, the Appellate Division erroneously assumed that it could divest appellants of possession without passing on their claim of ownership.

As previously noted, the judgment of this court in the *Dibble* case (*supra*) literally did not "determine right or title in the land", since there was no dispute that the Seneca Indian Nation had conveyed the lands in question to defendants' predecessors in title. All that case decided was that under the treaties of conveyance the defendants had no right of entry onto the reservation lands until certain conditions precedent occurred. Under the peculiar circumstances of the *Dibble* case, the right to occupy the lands had not yet vested in the record owners of the fee. Since the Indians were not obliged to surrender possession until directed to do so by the United States Government, it was possible to evict defendants as intruders, notwithstanding their alleged title to the premises.

In the instant case, however, title and the right to possession were inseparable, and the trial court lacked jurisdiction to oust appellants as intruders without a finding that the disputed parcel was, in fact, Indian land. The court made the requisite finding that the lands in question were part of the Shinnecock Reservation, thereby sustaining its jurisdiction, and its order most decidedly determined "right or title in the land". By holding to the contrary, without passing on the factual issue of ownership, the Appellate Division ruled, in effect, that appellants could be removed as intruders, notwithstanding the fact that they might own the land in question. Since this ruling

is erroneous as a matter of law, section 606 of the Civil Practice Act requires us to remit the case to the Appellate Division for its determination upon the questions of fact raised in that court.

In short, the County Court, having jurisdiction of the parties and the proceeding, had power under section 8 to decide the issue of ownership. The Appellate Division, however, could not affirm the order divesting appellants of possession without deciding who had title to the land and hence the right to possession.

The order appealed from should be reversed, without costs, and the matter remitted to the Appellate Division for further proceedings not inconsistent with this opinion.

DESMOND, *J.* (dissenting): First enacted as chapter 204 of the Laws of 1821, the statute which is now section 8 of the New York Indian Law prescribes a summary procedure for ousting from "lands owned or occupied by any nation, tribe or band of Indians" in the State any intruders, that is, any persons attempting to settle or reside on such lands "except the members of such nation, tribe or band." In *People ex rel. Cutler* v. *Dibble* (16 N. Y. 203, aff'd. 62 U. S. 366) the purpose of such a proceeding was authoritatively stated as being "to remove intruders from what are indisputably the ungranted lands of the state, or the reservations of the Indian tribes" (16 N. Y., p. 214). The holding of this court in the *Dibble* case, never since questioned, was that "the order of removal adjudicates upon no claim, and determines no right or title, but leaves the party removed to the usual remedies to assert and establish any title to the *locus in quo* which he may deem himself to possess" (same page). The lower court *Dibble* decision (18 Barb. 412) which this court affirmed had said (pp. 415-416) that, in order to give a County Judge jurisdiction of such a removal proceeding, "it must appear, undoubtedly, that the intrusion was upon indian lands, that is, lands belonging to or occupied by a nation or tribe of indians". The United States Supreme Court, affirming this court

in *Dibble*, declared that "The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace" (62 U. S., p. 370). Every other authority, early or late, construes the *Dibble* case as holding that a section 8 proceeding is purely a summary one whereby the State exercises its police power to keep the peace on Indian lands (see "Federal Indian Law", U. S. Dept. Interior, 1958, p. 514, n.; 27 Am. Jur., Indians, § 48, pp. 57[illegible]73; 42 C. J. S., Indians, § 72, p. 784; Judge POUND in 22 [illegible]l. L. Rev. 97-99; *People ex rel. Ray* v. *Martin*, 294 N. Y. 61, 72, 73; *Matter of Stakel* [*Blueye*], 281 App. Div. 183, aff'd. 306 N. Y. 679; *Matter of Fischer* [*Checkman*], 283 App. Div. 518; *Matter of Herne*, 133 Misc. 286).

Despite all this, the County Court in the proceeding here under review undertook to decide a question of title as between the Shinnecock Indians and the defendant corporations which had built houses on the lands in dispute. The dispute which made its appearance at the trial of this section 8 proceeding was as to the boundary line of premises to which these defendants held title. When it thus became apparent that this was no matter of removing squatters from undisputed Indian lands but an actual dispute as to ownership, the County Judge should have dismissed the proceeding as being unavailable for such a purpose. Instead, the court denied defendants' motion on this jurisdictional ground for dismissal, and undertook to settle the contest as to boundary and title by making an order describing the land in litigation as being "owned and occupied" by the Shinnecock Tribe on whose behalf the District Attorney of Suffolk County (see § 8) had brought the proceeding. The Appellate Division affirmed, adopting from the *Dibble* opinion in this court the statement that the order "does not determine right or title in the land [but] leaves the parties * * * to the usual remedies to assert and establish * * * title."

We agree with the Appellate Division that no section 8 order can determine the ownership of land which is in dispute between an Indian Tribe and other persons. However, it follows from this that the Appellate Division, instead of affirming, should have reversed the County Court order and should have dismissed the proceeding, leaving the parties to the "usual remedies" to which the Appellate Division referred.

The Shinnecock Tribe of Indians, now numbering about 200 persons, has occupied lands on the easterly end of Long Island since before the white settlers arrived (see Report of Special Indian Committee, N. Y. State Assembly, Document No. 51, 1889, p. 53; and "The Indian Today in New York State," published by N. Y. State Joint Legislative Committee on Indian Affairs and Interdepartmental Committee on Indian Affairs, rev. April 1, 1959, p. 10). Just a century ago in 1859, by authority of chapter 46 of the Laws of that year, various land transactions and disputes between the tribe and the Town of Southampton, Suffolk County, were settled (see *People ex rel. Howell* v. *Jessup*, 160 N. Y. 249), by an exchange of deeds which partitioned lands including the parcel here in dispute by conveying to the trustees of the Shinnecock tribe a parcel known as Shinnecock Neck, south of an "Indian ditch" and by conveying to the town the lands lying north of that ditch (see reference in "Federal Indian Law", *supra*, p. 984). Defendants in this proceeding derive their title through mesne conveyances from the Town of Southampton as such 1859 grantee. Whether the plot of land here in litigation was on the north or south side of the old "Indian ditch" in 1859 determines whether it belongs to the Shinnecock Tribe or to defendants, but the actual ditch has long since disappeared. The issue, therefore, which took form during the course of this trial, was as to a boundary line. For such an adjudication a section 8 proceeding could not validly be used.

Section 8 of our Indian Law is of the same character and meaning as the Federal "intruder" statutes passed by Congress from time to time (see U. S. C., tit. 25, § 180, former §§ 220, 222; *Cook* v. *Hudson*, 110 Montana 263, 285 *et seq.*; *Murdock* v. *Farrell*, 49 Utah 314, 319; *Eells* v. *Ross*, 64 F. 417; *United States* v. *Flournoy Live-Stock & Real Estate Co.*, 71 F. 576; *United States ex rel. Gordon* v. *Crook*, 179 F. 391; *Morris* v. *Hitchcock*, 194 U. S. 384, 389; and see other Federal statutes cited in "Federal Indian Law", *supra*, p. 632, n.) An assertion is made here that our present section 8 is somehow different in meaning from its prototype construed in the *Dibble* case (*supra*). The difference is said to be that the statute now calls specifically for notice to the defendant and requires the County Judge to take proof of the facts, whereas neither of those requirements was expressed in the law at the time that *Dibble* was decided. However, this difference proves nothing since the *Dibble* case record shows that notice was given and that the facts were fully tried out before the court (and see *People ex rel. Waldron* v. *Soper*, 7 N. Y., p. 430 [1852]).

Petitioner says that all questions as to the jurisdiction of the County Judge to decide the title dispute are out of the case because defendants waived this jurisdictional point. At the opening of the hearing, the County Judge asked defense counsel whether there was any objection to the procedure being pursued by the District Attorney, that is, any objection to the use of section 8. The defense attorneys answered that they had no objection and that there was no question of jurisdiction. Of course there was at that moment no question of jurisdiction since the District Attorney under the statute and as representing the tribe was before the court on a complaint that defendants were intruders on the tribal lands. That complaint required the Judge to issue a notice to the defendants and to hold a hearing, take proof of the facts and determine whether defendants were intruders "upon the lands of such reservation."

But a true jurisdictional question did come into the case when the proofs showed that this was actually an issue as to ownership of land. At that stage of the trial defense counsel made a timely motion to dismiss the proceeding on the ground that the court had no jurisdiction since it appeared that the land was not indisputably within the bounds of an Indian reservation. The County Judge held that the jurisdictional point had been waived by defendants. We do not agree. Subject matter jurisdiction cannot be waived (see *Meyers* v. *American Locomotive Co.*, 201 N. Y. 163, 166; *Buckles* v. *State of New York*, 221 N. Y. 418; *Shea* v. *Export S.S. Corp.*, 253 N. Y. 17, 21) and, furthermore, the record here shows that there was in fact no intent to waive. Thus, although full proof was taken as to boundary and title, there was no jurisdiction in the County Court to make a determination thereon.

There is other historical data which would make it highly inappropriate to use a "reservation intruder" statute like section 8 to decide this boundary line quarrel. The Shinnecocks have never had treaty relations or any other relations with the United States Government, they have lost such tribal customs and language as they may have used in times long past, their lands are not listed as "reservations" by the United States Indian Service and for generations they have been considered to be under New York State's control, protection and government (see 1934 Atty. Gen. 285; informal opinion of Attorney-General of New York, June 11, 1941).

It is suggested that this determination should be allowed to stand and that the Shinnecock Tribe should have the benefit of it because it may be impossible, on account of the status of the Indian Tribe, to get a determination in any other form of litigation. That question is not before us now. However, we point out that sections 5, 11-a, 120 and 121 of the Indian Law make available to the Shinnecock Tribe and its members, as well as to those suing them, full

access to our State courts (see *St. Regis Tribe* v. *State of New York*, 5 N. Y. 2d 24). Sections 5 and 11-a give full jurisdiction to the State courts as to Indian reservations like that of the Shinnecocks where there is no Peacemaker's Court and make broad provision for actions and special proceedings in the State courts between Indians or between one or more Indians and any other person (see, as to Federal authorization for § 5 amdt., U. S. Code, tit. 25, § 233, and U. S. House Reports Nos. 2720, 3040, 81st Cong., 2d Sess. [1950]). More specifically as to the Shinnecock Tribe, sections 11-a and 121 authorize the trustees of that tribe to deal with the lands of the tribe including the maintenance of actions or proceedings to recover the possession of such lands of the tribe unlawfully occupied by others and for damages for such occupation.

The order should be reversed, without costs, and the proceeding dismissed.

Chief Judge CONWAY and Judges DYE and BURKE concur with Judge FROESSEL; Judge DESMOND dissents and votes to reverse and to dismiss the proceeding in an opinion in which Judge VAN VOORHIS concurs; Judge FULD taking no part.

Order reversed, etc.

(2)

Opinion of New York Appellate Division, Second Department, on Initial Appeal
(4 A. D. 2d 749, 165 N. Y. S. 2d 143)

In the Matter of Harry C. Brenner, as District Attorney of the County of Suffolk, Respondent. Great Cove Realty Co., Inc., et al., Appellants; Realty Associates, Inc., et al., Respondents.—In a proceeding pursuant to section 8 of the Indian Law, Great Cove Realty Co., Inc., and Devonshire Construction Corp. appeal from so much of an order of the County Court, Suffolk County, as adjudges that appellants are intruders upon a certain portion of reservation lands of the Shinnecock Tribe of Indians and directing that a warrant issue to the sheriff commanding him to remove said intruders from said lands. The order does not determine right or title in the land. It leaves the parties who are removed from the land in question to the usual remedies to assert and establish any title to the land which they deem themselves to possess (see *People* v. *Dibble*, 16 N. Y. 203, affd. *sub nom. State of New York* v. *Dibble*, 21 How. [62 U. S.] 366). Order, insofar as appealed from, unanimously affirmed, without costs. No opinion. Present—Wenzel, Acting P. J., Beldock, Ughetta, Hallinan and Kleinfeld, JJ.

(3)

Opinion of New York Appellate Division, Second Department, Rendered on Remission from Court of Appeals (9 A. D. 2d 948, 195 N. Y. S. 2d 935)

In the Matter of Harry C. Brenner, as District Attorney of the County of Suffolk, Respondent, against Great Cove Realty Co., Inc., et al., Appellants, and Realty Asociates, Inc., et al., Respondents.—In this proceeding pursuant to section 8 of the Indian Law, Great Cove Realty Co., Inc., and Devonshire Construction Corp. appealed from so much of an order of the County Court, Suffolk County, as adjudged that appellants were intruders upon a certain portion of reservation lands of the Shinnecock Tribe of Indians and as directed that a warrant issue to the sheriff commanding him to remove said intruders from said lands. On July 1, 1957 this court affirmed the order (*Matter of Brenner* v. *Great Cove Realty Co.*, 4 A. D. 2d 749) and, in doing so, deemed it unnecessary to determine the factual question of whether the disputed land was part of the said reservation lands or whether title thereto was in appellant Great Cove Realty Co., Inc., and also considered that the order of the County Court had not actually determined that factual question. Thereafter, the Court of Appeals reversed the order of this court and remitted the matter with a direction that this court pass on that factual question, being of the opinion that the proceeding could not be decided without a determination of that question and that the County Court had indeed resolved that question in favor of the respondent Brenner (*Matter of Brenner* v. *Great Cove Realty Co.*, 6 N. Y. 2d 435, reargument denied 7 N. Y. 2d 805). Upon remission, order of the County Court, Suffolk County, insofar as appealed from, unanimously affirmed, without costs. In our opinion, the finding of the trial court on the disputed question of title was not against the weight of the credible evidence. Present—Wenzel, Acting P. J., Beldock, Ughetta, Hallinan and Kleinfeld, JJ.

(4)

Opinion Rendered by the County Court, Suffolk County, New York
(207 Misc. 114, 137 N. Y. S. 2d 570)

In the Matter of District Attorney of Suffolk County, Petitioner. Great Cove Realty Co., Inc., et al., Respondents.

County Court, Suffolk County, January 17, 1955.

Hazelton, Acting County Judge. In this proceeding brought by the District Attorney of Suffolk County as petitioner, under section 8 of the Indian Law, petitioner seeks to oust respondents as intruders upon the lands of the Shinnecock Tribe, whose reservation is located in the Town of Southampton.

By chapter 46 of the Laws of 1859, the trustees of the tribe were empowered to convey to the trustees of the lands of the Town of Southampton, all their interest in certain lands generally known as Shinnecock Hills and Sebonac Neck lying north of a certain line commencing at the head of the creek and running along Indian Ditch, where a fence then stood, to the Stephen Post Meadow, thence along the Old Ditch on the south side of said Meadow to the Old Fort Pond. And the trustees of the lands of the Town of Southampton in turn were authorized to receive such conveyance from the Indians in consideration of a deed conveying to the trustees of the Indians in behalf of the Shinnecock tribe, all the land commonly called Shinnecock Neck, lying south of the before-described line, commencing at the head of the creek on the east side of said neck, and running along the Indian ditch, where the fence at that time stood, to the Stephen Post meadow; thence along the old ditch on the south side of said meadow to Old Fort Pond. The statute states that "The true intent and meaning of this act is, and it shall be construed to be, to enable

the said Shinnecock tribe of Indians to exchange all their rights in and to the land north of said line, for a full release to them by said trustees of said proprietors, of all their rights in and to all land south of said line."

The preamble to the statute recited that the Shinnecock tribe was in occupation of attractive land called Shinnecock Neck by virtue of a lease; that the tribe lived on the land, had rights of pastorage, and that the rights of the tribe and the trustees were in conflict and causing frequent and expensive litigation. It was also stated that a verbal agreement and arrangement had been entered into between the tribe and the trustees for the full release, each to the other of all their rights on either side of an established line to the end that each might improve and own in severalty all the lands on their side of the line. Conveyances accordingly were executed and exchanged.

In May of 1954, one of the respondents, the Great Cove Realty Company, entered upon a triangular parcel of land of about nine acres, located at the northwesterly end of the reservation, prepared same for development, and has in part constructed a number of homes. This was done according to Charles Smith, a trustee of the tribe, after he had warned a representative of the Great Cove Realty Company that the land was part of the Shinnecock Reservation.

The question presented is "Where was the old Indian Ditch mentioned in the legislation of 1859 located when the above conveyances were exchanged?" The petitioner and the Shinnecock tribe contend that the ditch ran along the southerly shoulder of an old sand road that is now Montauk Highway. The respondents claim the ditch was of sufficient distance to the south of the highway, so as to include the fract under consideration.

Two rulings must be made upon certain evidence. The petitioner submitted declarations made by people who are now dead, as to what they said was the location of the old ditch that is the northern boundary of the reservation.

Such evidence is known as reputation evidence and may be received under certain circumstances when the evidence relates to matters of public or community interest. Proof of actual knowledge upon the part of the declarant is not necessary when the declarations relate to matters of public interest because all persons are presumed to have knowledge of public matters. However, when the testimony relates to matters of only general or community interest, as in this proceeding, then there is no presumption of knowledge, so that such knowledge by the declarant must be proven. I am of the opinion that from all the surrounding circumstances, it clearly appears and has been proven that declarants had such knowledge. I therefore deny respondents' motion to strike such testimony from the record.

A letter was written by an attorney for the trustees of the tribe, which trustees are now deceased. This letter and its reply were offered in evidence by respondents, and objected to by petitioner upon the grounds that the contents of the letters constituted a privileged communication between the trustees and their attorney. It appears that the attorney had been retained not to give professional advice, but rather as a representative to negotiate for the tribe in the purchase at a nominal price of the triangular parcel in question, and that the attorney had been authorized to transmit to others what was said in the letters. It may have been that since the parcel first came into existence by conveyance as an entity in itself in 1925, and had been the subject of various conveyances since that time, the tribe was endeavoring to clear up the question of title by purchase at a nominal price for the reason that Indians are circumscribed and restricted by statute as to when they may sue or be sued. I do not know; but in any event, the trustees were not asking the attorney for professional advice, but rather to represent them in negotiations to acquire the land. This in itself indicates that neither the conversations between the attorney and the trustees, nor

the letters were privileged. See *Avery* v. *Lee*, 117 App. Div. 244, where almost precisely the same facts that exist here were before the court. Since the communication made by the trustees was not intended for the attorney alone, but by its very nature was to be disclosed to third parties, the privilege arising out of the relationship of attorney and client does not apply. (Richardson on Evidence [7th ed.], § 486.) Both the conversation and the letters therefore are accordingly admitted in evidence.

Typical of much of the testimony offered by respondents was that of Mr. Edward A. Howell, President of the First National Bank of Southampton, who testified that he had lived near the reservation for eighty years, and was familiar with it since he was seven or eight years of age. He said Montauk Highway was first a dirt road, and the old Indian ditch ran along the southern shoulder of the highway; that a fence was in the ditch; that the ditch was a marker for the boundary of the reservation, that he never saw a ditch on the north side of the highway, and that he last saw the fence about forty or fifty years ago. This witness also clearly identified the Stephen Post meadow mentioned in the legislation of 1859 and referred to in the two conveyances exchanged in accordance therewith.

Charles Smith, a thirty-six-year-old trustee of the tribe, testified that when he was sixteen years of age, he saw two ditches, about nine feet apart, about sixty-five to seventy feet south of the highway at the westerly end of the reservation, and that these ditches ran on a slant about two hundred feet upward into the southerly side of the highway, which at that time was an improved road. What this witness related ties in with the evidence of Timothy Downs, which I will later comment upon.

One Augustus Raynor, seventy years of age, who has been acquainted with the reservation and its people since boyhood recalled that he hauled gravel for the construction

job, and distinctly remembers the old ditch running along the southerly side of the highway. He considered the ditch to be the northerly boundary of the reservation, and had been told so by a trustee of the tribe, whom he identified. This witness said there were quite a few other ditches inside the reservation, which recollection is similar to that of others.

The highlight of this entire proceeding was the evidence of Timothy Downs, now in the late winter of his life, who was so crippled by the infirmities of old age, that his testimony had to be taken at his home in Greenport. Downs clearly recalled the old ditch running along the southerly side of the old sand road from a point at the east beginning about three hundred feet from the town line, and then running westerly the entire length of the reservation. He was absolutely certain the ditch was the northerly boundary of the reservation. He related how he had worked as a checker on the construction job when Montauk Highway had its first hard surface laid; that the engineers ran their line along the ditch, that north of the ditch was town land, and south of the ditch was Indian land. That the hard surface put on was twelve or fifteen feet wide; that the road was only a one-strip road; that the workers had to keep the concrete about ten feet north of the boundary ditch of the Indian reservation, thus leaving a dirt shoulder between the newly laid hard highway and the old ditch. He said that at the westerly end of the reservation, the ditch ran down because of a swail, which point in his testimony agrees with that of Charles Smith, the trustee of the tribe, who testified that about two hundred feet of the old ditch, which slanted away from the highway, was still a visible line until destroyed by defendants when they entered upon the land. This old gentleman was blessed with a clear recollection, sound mind and memory and when he told his story undoubtedly was at peace with God and man.

Montauk Highway is no longer a narrow one-strip road, but has a wide hard surface with shoulders on the sides.

It is reasonable to assume, and I am satisfied that the ditch recalled by Mr. Downs was destroyed thereafter by the widening and modernizing of the highway. The swail is still there just as he said. From the testimony of these witnesses standing alone, although the old ditch became obscure because of the sands of time and the march of man, it would seem that the old ditch ran along the southerly line of the Montauk Highway until it slanted off at the west as testified to by the witness Smith.

The evidence offered by the respondents consisted mostly of maps, surveys and testimony of two surveyors, one of whom had certified to the correctness of the survey of the property which is the subject of this inquiry, and Robert Hubbard, who recalled he had seen many yards of topsoil taken from the land without any interference by the tribe. However, the surveyor who made this certified survey, had acquired the plant of one Wallace H. Halsey, who had been a surveyor for many years in the town of Southampton. This same Halsey also had made a survey of School District No. 6, which beyond a doubt showed that the northerly boundary of the Shinnecock Reservation, where the questionable property lies, is the southerly line of Montauk Highway, and that the nine-acre tract is part of the Shinnecock Reservation. It is highly significant that this survey was made in 1921 before the questioned parcel came into existence of record in 1925 as a separate entity, and in my mind is a true survey. Some witnesses produced by respondents said they saw the old ditch and other ditches, and that part of the old ditch still remains obvious. However, what they described as the old ditch, I believe, from the evidence, to be just another ditch with which the reservation is lined in several places. What they saw could not have been the old ditch referred to in chapter 46 of the Laws of 1859 because that old Indian ditch had already been obliterated by the modernizing of Montauk Highway.

Appendix A—Opinions Rendered by the Courts Below

Since it appeared to be certain that this trial would be a long and expensive one to both the county and respondents, this court, before the taking of testimony, inquired whether any question would be raised in respect to the procedure taken by the petitioner or the jurisdiction of this court, whereupon all parties-respondent assured this court there would be no such question raised. In the stipulation entered into in open court before the trial, this appears:

> "The Court: Now, there is not going to be raised here, I take it, any point involving the question of whether or not the procedure pursued by the District Attorney is the proper procedure, is that correct?
>
> Mr. Permut: No question on that.
>
> Mr. O'Malley: No.
>
> The Court: Because I don't want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised. If such a question were to be raised, I would pass upon that as we do in the Surrogate's Court, preliminarily, and then move on to the matter of substance.
>
> Mr. Permut: There is no question on that score on behalf of my defendants [respondents]."

Nevertheless, in spite of what they unquestionably had agreed to, respondents, after the close of this case, moved to dismiss the proceeding upon the ground that the court lacked jurisdiction. In the event respondents had chosen to change their position anent jurisdiction after they had consented to same, they should have done so at the earliest possible time, and not have waited until the taking of testimony had ended. Such a stratagem fails utterly to impress this court.

It is well-settled law that an Indian tribe may not sue or be sued without express statutory authority. (*King* v. *Warner*, N. Y. L. J., June 22, 1953, p. 2085, col. 5.) Such express statutory authority for the present proceeding is section 8 of the Indian Law. Take it away from them, and the Indians would have no relief against the intrusion of which they here complain. It is the sole and only remedy afforded to Indians to protect "any lands owned or occupied" by them against intrusions.

The status of Indians is succinctly stated in *People ex rel. Cutler* v. *Dibble* (16 N. Y. 203) at pages 212, 213:

> "The Indians are not citizens of the state in the exact sense of that term. They have been treated, since our first intercourse with them, as *quasi* independent nations or tribes, having governments and institutions and national attributes of their own; but, both collectively and individually, feeble and helpless compared with the whites, and therefore needing constantly the protection and paternal care of the government. • • •
>
> "A rule which would authorize individual citizens to obtain possession of their lands, under any claim or pretense whatever, without the sanction of the government, and put them or it to the slow and tedious process of an action at law to recover it back again, would be destructive of their rights and subversive of the duties and obligations which the government owes them."

The motion to dismiss the petition is denied; judgment as prayed for by the petitioner is granted, and it is directed that a warrant of removal be issued to the Sheriff of the County of Suffolk commanding him to remove the respondents from the lands described in the petition.

APPENDIX B

Orders and Judgments of the Courts Below

Order and Judgment of Appellate Division, Second Department, Appealed From

At a Term. of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 31st day of December, 1959.

Present:

HON. HENRY G. WENZEL, JR.,
Acting Presiding Justice,
" GEORGE J. BELDOCK,
" HENRY L. UGHETTA,
" JAMES T. HALLINAN,
" PHILIP M. KLEINFELD,
Justices.

In the Matter of the Application of HARRY C. BRENNER, District Attorney of the County of Suffolk, for an order of removal,

Respondent,

v.

GREAT COVE REALTY CO., INC., DEVONSHIRE CONSTRUCTION CORP., their agents, servants and employees,

Appellants,

and

REALTY ASSOCIATES, INC., sued herein as JOHN DOE, and MONARCH POWER & HEATING CO., SHILLITO DOORS CORP. and EDELSON REALTY COMPANY, sued herein as RICHARD DOE, as intruders on Indian Tribal Lands and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Respondents.

The above named Great Cove Realty Co., Inc., and Devonshire Construction Corp., etc., the appellants in this

proceeding, having appealed, as matter of right, to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, Second Judicial Department, dated July 1st 1957, and entered in the office of the Clerk of said Court on July 7th, 1957, unanimously affirming, without costs, an order of the County Court, Suffolk County, entered March 4th, 1955, insofar as same adjudged that said appellants intrude and are intruders upon lands owned and occupied by the Shinnecock Indian Tribe, and directing the issuance of a warrant, etc., herein.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be reversed, without costs, and the matter remitted to said Court for further proceedings not inconsistent with opinion herein, and having further ordered that the record and proceedings herein be remitted to the County Court, Suffolk County, there to be proceeded upon according to law,

And this Court having read the remittitur of the Court of Appeals dated July 8, 1959, and the opinion of the Court of Appeals, and this Court having considered the matter pursuant to said remittitur and opinion, and after due deliberation and upon the opinion and decision slip of the Court herein, dated December 31st, 1959, it is

ORDERED, that the order of the Court of Appeals of the State of New York, be and the same hereby is made the order of this Court, and it is

FURTHER ORDERED, that the order of the County Court, Suffolk County, entered March 4th, 1955, insofar as appealed from, is hereby unanimously affirmed, without costs.

Enter:

GERALD NOLAN,
Presiding Justice.

Appendix B—Orders and Judgments of the Courts Below

Order and Judgment of County Court, Suffolk County, New York

At a Term of the County Court held in and for the County of Suffolk at the Court House, Riverhead, Suffolk County, N. Y., on the 4th day of March, 1955.

Present:

HON. EDGAR F. HAZELTON,
Surrogate and Acting County Judge.

In the Matter

of

The Application of HARRY C. BRENNER, District Attorney of the County of Suffolk, for an Order of Removal,

Petitioner,

against

GREAT COVE REALTY CO., INC., DEVONSHIRE CONSTRUCTION CORP., their Agents, Servants and Employees, and John Doe and Richard Roe as Intruders on Indian Tribal Lands,

Respondents.

Application having been heretofore made to Hon. Fred J. Munder, County Judge of the County of Suffolk, by Harry C. Brenner, District Attorney of Suffolk County, for an order under Section 8 of the Indian Law removing Great Cove Realty Co., Inc., Devonshire Construction Corp., their agents, servants and employees, and John Doe and Richard Roe, from the lands owned and occupied by the Shinnecock Tribe of Indians known as the Shinnecock Indian Reservation at Southampton, Suffolk County, New York, upon the ground that they are intruders thereon, and after reading and filing the complaint of Harry C.

Brenner, said District Attorney, verified the 13th day of October, 1954, and the said County Judge having issued a notice directed to said Great Cove Realty Co., Inc., and Devonshire Construction Corp., their agents, servants and employees, and John Doe and Richard Roe requiring them to appear before him on the 25th day of October, 1954, at 10 o'clock in the morning of that day, and the said Great Cove Realty Co., Inc., and Devonshire Construction Corp., having thereupon appeared by Morris Permut, Esq., and William H. Kinn, Esq., and Realty Associates, Inc., served as John Doe, having appeared by Joseph V. McKee, Esq., by John C. O'Malley, Esq., of Counsel and the Monarch Power and Heating Co. and Shillito Doors Corporation and Edelson Realty Company, all served as John Doe, having thereupon appeared by Morris and Mitchell, Esqs., by Sidney L. Mitchell, Esq., of counsel, and Great Cove Realty Co., Inc., and Devonshire Construction Corp. and Realty Associates, Inc., having answered the complaint therein, and Monarch Power and Heating Co., Shillito Doors Corporation and Edelson Realty Company not having answered the complaint herein, and the matter having been adjourned to the 10th day of November, 1954, and proof of the personal service of such notice having been duly made, and proof of the facts alleged in the complaint having been taken at a hearing before Edgar F. Hazelton, Surrogate and Acting County Judge of Suffolk County, in the Suffolk County Court House at Riverhead, New York, on November 10, 1954, November 12, 1954, November 17, 1954, November 30, 1954, December 1, 1954, December 10, 1954, December 15, 1954, December 16, 1954, and before said Surrogate and Acting County Judge at 602 Main Street, Greenport, Suffolk County, New York, on December 17, 1954, and at 2 Woodbine Avenue, Northport, Suffolk County, New York, on December 30, 1954, and the Court thereafter having made its memorandum of decision in writing dated January 17, 1955, determining that said Great Cove Realty Co., Inc., Devonshire Construction Corp.

Monarch Power and Heating Co., Shillito Doors Corporation and Edelson Realty Company, their agents, servants and employees are intruders upon the lands of said Reservation, to wit, the northerly portion thereof, consisting of a triangular portion thereof and shown and designated on a certain survey of Shinnecock Hills dated September 11, 1952, made by Theodore F. Squires, said lands being hereinafter described and the Court having granted the motion of Realty Associates, Inc., to dismiss the complaint as to it,

Now, on motion of Harry C. Brenner, District Attorney of Suffolk County, it is

ORDERED, ADJUDGED AND DECREED that the complaint in this proceeding against the defendant Realty Associates, Inc., sued herein as John Doe, be and the same hereby is dismissed, and it is further

ORDERED, ADJUDGED AND DECREED that Great Cove Realty Co., Inc., Devonshire Construction Corp., Monarch Power and Heating Co., Shillito Doors Corporation and Edelson Realty Company, their agents, servants and employees, intrude and are intruders upon the lands owned and occupied by the Shinnecock Indian Tribe, to wit, the reservation lands of the Shinnecock Tribe of Indians at Southampton, Suffolk County, New York, and upon that portion thereof hereinafter described, without permission so to do and without authority by law so to do, and it is further

ORDERED, ADJUDGED AND DECREED that a warrant issue to the Sheriff of the County of Suffolk, commanding him within 10 days from the receipt thereof to remove Great Cove Realty Co., Inc., Devonshire Construction Corp., Monarch Power and Heating Co., Shillito Doors Corporation and Edelson Realty Company, their agents, servants and employees from the reservation lands of the Shinnecock Tribe of Indians at Southampton, Suffolk County, New

York, and from that portion thereof hereinafter described, and it is further

ORDERED, ADJUDGED AND DECREED that the lands owned and occupied by the Shinnecock Tribe of Indians and affected by this determination are bounded and described as follows:

All that certain tract or parcel of land situate, lying and being at Southampton, in the Town of Southampton, County of Suffolk and State of New York, bounded and described as follows:

Beginning at a point on the southwesterly side of Montauk Highway where the easterly side of land now or formerly of Duncan Gentles intersects the said southwesterly side of Montauk Highway; running thence along Montauk Highway south 74 degrees 8 minutes East 359.92 feet and South 69 degrees 10 minutes 10 seconds East 2,086.06 feet to a point; thence along other lands of Shinnecock Indian Reservation North 76 degree 23 minutes 40 seconds West 473.92 feet; thence North 75 degrees 21 minutes West 789.12 feet; thence North 79 degrees 41 minutes 54 seconds West 361.96 feet; thence north 79 degrees 20 minutes 54 seconds West 525.70 feet and North 81 degrees 3 minutes 53 seconds West 327.36 feet to a monument; thence North 21 degrees 27 minutes 7 seconds East 339.96 feet to the southwesterly side of Montauk Highway at the point or place of beginning.

Enter,

EDGAR F. HAZELTON,
Surrogate and Acting County Judge

Granted Mar. 4, 1955

WILLIAM H. FRY
Clerk
By C. H. V.

Order and Judgment of Appellate Division, Second Department, on Initial Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 1st day of July, 1957.

Present:

HON. HENRY G. WENZEL, JR.,
Acting Presiding Justice,
" GEORGE J. BELDOCK,
" HENRY L. UGHETTA,
" JAMES T. HALLINAN,
" PHILIP M. KLEINFELD,
Justices.

—o—

In the Matter

of

The Application of HARRY C. BRENNER, District Attorney of the County of Suffolk, for an Order of Removal,

Respondent,

vs.

GREAT COVE REALTY CO. INC., DEVONSHIRE CONSTRUCTION CORP., their agents, Servants and Employees,

Appellants,

and

REALTY ASSOCIATES, INC., sued herein as John Doe, and MONARCH POWER & HEATING CO., SHILL TO DOORS CORP., and EDELSON REALTY COMPANY, sued herein as Richard Doe, as Intruders on Indian Tribal Lands and Trustees of the Shinnecock Indian Tribe,

Respondents.

—o—

The above named Great Cove Realty Co., Inc. and Devonshire Construction Corp., respondents in this proceeding having appealed to the Appellate Division of the Su-

preme Court from so much of an order of the County Court, Suffolk County, entered in the office of the Clerk of the County of Suffolk on the 4th day of March, 1955, as adjudges that said respondents intrude and are intruders upon lands owned and occupied by the Shinnecock Indian Tribe, and directs the issuance of a warrant, etc., herein; and the said appeal having been argued by Mr. Morris Permut, of Counsel for Appellants, and argued by Mr. John P. Cohalan, Jr., of Counsel for the respondent, Harry C. Brenner, District Attorney of the County of Suffolk, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

IT IS ORDERED that the order, insofar as appealed from, be and the same hereby is unanimously affirmed, without costs.

Enter,

JOHN J. CALLAHAN,
Clerk.

Order and Remittitur of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of July in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

Witness,

The HON. ALBERT CONWAY, Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur July 8, 1959

No. 314.

In the Matter of the Application of HARRY C. BRENNER, District Attorney of the County of Suffolk, for an Order of Removal,

Petitioner-Respondent,

vs.

GREAT COVE REALTY CO., INC., DEVONSHIRE CONSTRUCTION CORP., their Agents, Servants and Employees,

Appellants,

and

REALTY ASSOCIATES, INC., &c., & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 20th day of October in the year of our Lord one thousand nine hundred and fifty-eight Great Cove Realty Co., Inc., Devonshire Construction Corp.,

their Agents, Servants and Employees, the appellants in this cause, came here unto the Court of Appeals, by Morris Permut, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Harry C. Brenner, District Attorney of the County of Suffolk, the petitioner-respondent, and Realty Associates, Inc. &c., & ors., &c., the respondent in said cause, afterwards appeared in said Court of Appeals by John P. Cohalan, Jr., and David DuVivier, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Arthur Karger of counsel for the appellant, and by John P. Cohalan, Jr. and David DuVivier of counsel for the petitioner-respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the matter remitted to that Court for further proceedings not inconsistent with the opinion herein.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Suffolk County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, &c., as aforesaid,

AND hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Suffolk

County before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judge thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 8, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

STATE OF NEW YORK
COURT OF APPEALS

RAYMOND J. CANNON,
Clerk.

Order of New York Court of Appeals Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN THE COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of July, A. D., 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No, 371

In the Matter

of

The Application of HARRY C. BRENNER, District Attorney of the County of Suffolk,
Petitioner-Respondent,

For an Order of Removal,

vs.

GREAT COVE REALTY CO., INC., & ano., &c.,
Respondents-Appellants,

and

REALTY ASSOCIATES, INC. &c., & ors., &c.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the respondents-appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

RAYMOND J. CANNON,
Clerk.

FILE COPY

Office Supreme Court, U.S.
FILED
MAR 8 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

Docket No. 677

GREAT COVE REALTY CO., INC., and DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

APPEAL BY GREAT COVE REALTY CO., INC., AND, FROM THE DETERMINATION OF THE APPELLATE DIVISION OF THE SUPREME COURT, STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

NOTICE OF MOTION TO DISMISS APPEAL, AFFIDAVIT AND BRIEF IN SUPPORT THEREOF.

JOHN P. COHALAN, JR.,
District Attorney of Suffolk County, State of New York, for Appellees,
Riverhead, N. Y.

On the Brief:
HAROLD ASHARE,
MARVIN B. ASHARE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

Docket No. .....

GREAT COVE REALTY CO., INC., and
DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

Notice of Motion to Dismiss Appeal.

Sirs:

PLEASE TAKE NOTICE, Harry C. Brenner (formerly) District Attorney of the County of Suffolk, and Trustees of the Shinnecock Indian Tribe, appellees herein, upon all the proceedings heretofore had herein, and upon the affidavit of John P. Cohalan, Jr., District Attorney of Suffolk County, State of New York, sworn to March 4, 1961, do hereby apply to this Court for an Order dismissing the appeal herein upon the grounds that the appeal does not raise any new or novel question of law in this Court, and for the further reason that no constitutional question is presented within the provisions of the law relating to review in the United States Supreme Court, and for such

other and further relief as may be just and proper in the premise.

Dated: March 4, 1961.

JOHN P. COHALAN, JR.,
District Attorney of Suffolk County, State of New York, For the Appellees, Harry C. Brenner (formerly) District Attorney of Suffolk County and Trustees of the Shinnecock Indian Tribe.

ARTHUR KARGER,
Counsel for Appellants,
1271 Avenue of the Americas,
New York 20, New York.

Co-Counsel:

MORRIS PERMUT,
170 Broadway,
New York 38, New York.

Affidavit of John P. Cohalan, Jr., in Support of Motion to Dismiss.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

Docket No. .....

GREAT COVE REALTY CO., INC., and
DEVONSHIRE CONSTRUCTION CORP.,
Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,
Appellees.

STATE OF NEW YORK }
COUNTY OF SUFFOLK } ss.:

JOHN P. COHALAN, Jr., being duly sworn, deposes and says:

That he is the District Attorney of Suffolk County, State of New York. That this proceeding was instituted in the County Court of Suffolk County, State of New York, by a former District Attorney of the County of Suffolk, Hon. Harry C. Brenner. Such proceeding was instituted on October 13, 1954, pursuant to the provisions of Section 8 of the Indian Law of the State of New York. That the proceedings sought to obtain an order to remove the respondents-appellants and the other respondents from certain lands of the Reservation of the Shinnecock Tribe of Indians upon the ground that they are intruders and are improperly in possession of such property.

Affidavit of John P. Cohalan, Jr., in Support of Motion to Dismiss.

The respondents-appellees, Great Cove Realty Association, Inc. and Devonshire Construction Corp. interposed an answer to the complaint by Morris Permut, Esq., their attorney. An answer was likewise interposed by Joseph V. McKee on behalf of the respondents, Realty Associates, Inc.

The matter was tried in the County Court by the then Acting County Judge and Surrogate, Hon. Edgar F. Hazelton. After an extended trial, it was determined that the complainant-appellees were entitled to the possession of the premises, and an order was entered on March 4, 1955 directing a warrant to issue to the Sheriff of Suffolk County to remove the respondents from the premises which are situate in the Town of Southampton, County of Suffolk, State of New York, and determined the specific lands which were owned and should be occupied by the Shinnecock Tribe (pp. 24-28 of the record). It was also specifically stated and agreed between the attorneys for the appellants and the respondents, and the District Attorney, that the Court had jurisdiction to hear and determine the issues presented (ff. 110 and 111 of the record). The question of jurisdiction had been conceded on the record in the County Court. Such jurisdiction has been considered and approved in similar matters in this Court.

The problem of constitutionality of Section 8 of the Indian Law has likewise been determined by this Court. The respondents-appellees have had an opportunity to determine the issues of title as well as the right of possession to the premises in question in the County Court of Suffolk County, and have been accorded due process of law.

Affidavit of John P. Cohalan, Jr., in Support of Motion to Dismiss.

It would also appear that the Tribe of Shinnecock Indians may not specifically have been included within the limitations, if any, of Section 233 of Title 25 of the United States Code. The problems or questions of jurisdiction were not presented in the Court of original jurisdiction, and accordingly should not properly be heard or determined in this Court after the entry of judgment and a determination in the Appellate Division. The litigation in question should not be continued indefinitely. The appellants have had an opportunity to review the subject of the judgment on two occasions in the Appellate Division of the Supreme Court of New York, Second Judicial Department and once in the Court of Appeals, and again on two occasions in connection with motions for leave to appeal.

It is respectfully submitted that the appeal herein should be dismissed.

JOHN P. COHALAN, JR.,
District Attorney, Suffolk County,
State of New York.

Sworn to before me this
4th day of March, 1961

HAROLD ASHARE
Notary Public, State of New York
No. 52-5114800—Suffolk County
Term Expires March 30, 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

Docket No.

GREAT COVE REALTY CO., INC., and
DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

BRIEF OF APPELLEES IN SUPPORT OF APPLICATION TO DISMISS.

(Reference to folios and pages are from the Record on Appeal in the Court of Appeals)

Appellants herein have appealed to this Court by notice of appeal dated October 3, 1960. They have filed a Jurisdictional Statement which includes a summary of the questions presented and argument and memorandum in support of their contention that this Court should review the order from which said appellants have appealed.

Appellees will not repeat the determinations and opinions of the lower Courts and of the various orders of the lower Court, as the same are set forth in detail in the jurisdictional statement filed heretofore by the appellants.

The order of the County Court of Suffolk County, State of New York, was unanimously affirmed on July 1, 1957 by the Appellate Division of the Supreme Court (pp. 853, 854 of the record in the Court of Appeals).

Appellants' application for leave to appeal was denied on February 27, 1958 in the Court of Appeals of the State of New York upon the ground that the appellants could appeal to that Court as a matter of right by reason of a constitutional question having been raised within the meaning of Section 592, subd. 5a of the Civil Practice Act of the State of New York (pp. 853, 854 of the record).

It would appear to the appellees that there is no constitutional question which concerns jurisdiction or violations of constitutional rights presented by this appeal. That the questions preseated are not novel or new, since they have been determined by this Court heretofore and for the further reason that the appellants have not only consented to the jurisdiction of the Trial Court, but have, in open Court and upon the trial, consented to the jurisdiction of the County Court of Suffolk County.

Section 8 of the Indian Law in the State of New York is quoted in detail, as is Section 5 (pp. 4, 5, and 6 of the Jurisdictional Statement filed by the appellants).

The County Court of Suffolk County, State of New York, Has Jurisdiction to Hear and Determine the Issues, and Appellants Consented to such Jurisdiction.

When this matter was presented to the County Court of Suffolk County for consideration, the Trial Court recognized the possible problems presented insofar as the questions of jurisdiction were concerned. At folios 110 and 111 of the printed record the following appears concerning this subject:

> "The Court: Now, there is not going to be raised here, I take it, any point involving the question of

whether or not the procedure pursued by the District Attorney is the proper procedure, is that correct?

"Mr. Permut: No question on that.

"Mr. O'Malley: No.

"The Court: Because I don't want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised. If such a question were to be raised, I would pass upon that as we do in the Surrogate's Court, preliminarily, and then move on to the matters of substance.

"Mr. Permut: There is no question on that score on behalf of my defendants."

Notwithstanding the statement by appellants that they were satisfied with the jurisdiction of the Court to hear and determine the matter, the question of the jurisdiction was raised after the completion of the trial and considered by the Trial Judge. The Trial Court had this to say about this subject (ff. 64, 65 of the record):

"Nevertheless, in spite of what they unquestionably had agreed to, defendants, after the close of this case, moved to dismiss the proceedings upon the ground that the Court lacked jurisdiction. In the event defendants had chosen to change their position anent jurisdiction after they had consented to same, they should have done so at the earliest possible time, and not have waited until the taking of testimony had ended. Such a stratagem fails utterly to impress this Court."

The Court of Appeals of the State of New York, opinion by Froessel, J., 6 N. Y. 2d 435, 160 N. E. 2d 826 (see pp. 32 and 33 of the Jurisdictional Statement), had this to say concerning that subject:

"Appellants had a full dress trial on the issue of ownership, and their contention that the court

was obliged to dismiss the proceeding as soon as the evidence showed a genuine dispute as to title to the parcel, is untenable.

"As to the alleged constitutional right to a jury trial on the issue of title, we do not reach the merits of this claim, as appellants are estopped by their conduct from asserting it. At the very outset of the trial, it clearly appeared—by stipulation—that the principal issue in the case was a dispute as to ownership. Thereafter, upon the court's own inquiry, the defense attorney assured the court that his clients had no objection to the procedure pursued by the District Attorney. The court pointed out that it did not 'want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised', and the defendant attorney replied: 'There is no question on that score on behalf of my defendants.'

"While it is well settled that parties may not by their consent confer jurisdiction over the subject matter on a court (Meyers *v.* American Locomotive Co., 201 N. Y. 163, 166; Shea *v.* Export SS Corp., 253 N. Y. 17, 21), the right to a trial by jury is a personal right which must be timely asserted. Since appellants consented to have the issue of ownership tried by a court of competent jurisdiction and participated actively on the merits, they cannot now be heard to complain (Baird *v.* Mayor, 74 N. Y. 382; Security Discount Associates *v.* Weissbaum, 283 App. Div. 920)."

It would seem that the appellants should not consent to the jurisdiction and the authority of the Court to hear and determine the matter, and then raise this very issue when it appears they are unsuccessful in the Trial Court.

The constitutionality of Section 8 of the Indian Law, and the procedure therein, has been approved by this Court, see *People ex rel. Cutler et al* v. *Dibble*, 16 N. Y.

203 at 213, and affirmed in the United States Supreme Court, 21 How. 366, 16 L. Ed. 149, 62 U. S. 366. The *Dibble* case is also authority for the proposition that Section 8 of the Indian Law was designed to prevent individual citizens from obtaining possession of Indian land, "under any claim or pretense whatever without the sanction of the Government". It was the intention of the provision of the Indian Law to eliminate, if possible, the slow and tedious process of an action at law to recover real property (at p. 213 of the *Dibble* case).

Article I, Section 13 of the Constitution of the State of New York provides that all purchases of Indian lands by individual citizens are void, "unless made under the authority and with the consent of the legislature (New York)."

The Provisions of the United States Code, Section 233, Title 25, was not Intended to Include the Shinnecock Indian Tribe.

A reading of the House and Senate Reports relating to that legislation (see Senate Report No. 1836; House Reports Nos. 2720, 3040, 81st Congress, 2nd Session, 1950) indicates very clearly that it was intended to benefit the seven Indian tribes which are currently under Federal supervision in New York State, viz., the Senecas, the Tonawandas, the Tuscaroras, the Onondagas, the St. Regis Indians, the Oneidas and the Cayugas. Nowhere in the Congressional documents do we find any reference to the two still surviving Long Island tribes: the Shinnecocks and the Poospatucks.* Those two tribes have never been subject

* For one of the last episodes in the history of the Montauks, see *Johnson* v. *Long Island R. R. Co.* (1900), 162 N. Y. 462.

to any Federal jurisdiction or supervision, nor has any treaty ever been concluded between them and the Federal government, as was done at various times with the seven upstate tribes named above.

Section 233 of Title 25 of the United States Code was enacted for the purpose of allowing members of the upstate Indian tribes to obtain redress in the civil courts of New York State for any wrongs inflicted upon them without first having to sue in a peacemakers' court or other tribal tribunal, wherever such exists. In furtherance of that intent, the New York Legislature, soon after Section 233 became effective, amended Section 5 of the Indian Law so as to eliminate from it the exception previously contained therein of cases triable in the peacemakers' courts.

Still another indication that 25 U. S. C., Sec. 233 has no relevancy to the present appeal can be seen in the language of the act itself, which provides that "* * * nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe or band of Indians of any lands within any Indian reservation in the State of New York".

Section 233, Title 25 of the U. S. Code was never intended to require a trial *de novo* in a Court of another jurisdiction of the subject of boundary lines, and thus subject the appellees to further litigation.

In *Seneca Nation* v. *Christie* (1891), 126 N. Y. 122, aff'd 160 U. S. 283 that Court was called upon to decide whether grants of Indian lands within the State of New York could validly be made to individuals under the authority of the state, without the consent of Congress. In holding that such grants were valid, this Court, speaking unanimously per Andrews, J., said (126 N. Y., at p. 137):

"The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of the State of New York. * * *"

Then, after reviewing in detail the many treaties made between the State of New York and the Indian tribes residing within its borders, most of which had been entered into without specific authorization from Congress, this Court went on to say (126 N. Y., at p. 140):

"* * * The practical construction given by the State of New York to the Federal Constitution, as shown by the numerous treaties made by it with the Indian tribes, and the recognition by the federal authority of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the states from entering into treaties, does not preclude a state having the preemption right to Indian lands, from dealing with the Indian tribes directly, for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. * * *"

To the same effect, as to the Shinnecocks, see Op. Atty. Gen. (N. Y.) (1934), pages 285, 288.

The paramount right to extinguish Indian rights by purchase which the Colony and later the State of New York

acquired upon declaring its independence from the British Crown was never surrendered to the Federal government. The efforts of the appellants to inject Federal questions at this stage of the proceedings should be rejected.

The subject of the power of the State of New York to legislate concerning Indian affairs and property, and the constitutionality of such legislation, have been tested and determined by this Court heretofore. The principles of law enunciated by the majority opinion of the Court of Appeals in this very matter have been considered and supported by this Court as follows:

> *People ex rel. Cutler* v. *Dibble*, 16 N. Y. 203, Affirmed 62 U. S. 366;
> *Seneca Nation of Indians* v. *Christie*, 126 N. Y. 122, 160 U. S. 283, 40 L. E. 970, 16 S. Ct. 328.

The above determinations were also reaffirmed in *St. Regis Tribe of Mohawk Indians* against *The State of New York*, 5 N. Y. 2d 524, 177 N. Y. S. 2d 289, at pp. 299, 300 and 301. Application for writ of certiorari was denied in this Court, 359 U. S. 910 and 1146, 79 S. Ct. Reporter 586 and 1146.

In *Williams* v. *Lee*, 358 U. S. 218, 79 S. Ct. 269, this Court quoted the following at p. 221, Note 6, concerning the subject of jurisdiction of the State of New York in civil and criminal matters:

> "See, e. g., 62 Stat. 1224, 64 Stat. 845, 25 U. S. C. Sections 232, 233, 25 U. S. C. A. Sections 232, 233 (granting broad civil and criminal jurisdiction to New York); 18 U. S. C. Sec. 1162, 18 U. S. C. A. Sec. 1162, 28 U. S. C. Sec. 1360, 28 U. S. C. A. Sec. 1360 (granting broad civil and criminal jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin). The series of statutes granting extensive

jurisdiction over Oklahoma Indians to state courts are discussed in Cohen, Federal Indian Law—Revision by the United States Interior Dept. 1958."

Conclusion.

The motion to dismiss this appeal should be granted.

Respectfully submitted,

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On the Brief:

HAROLD ASHARE, and
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IN THE

Supreme Court of the United States

October Term, 1960

No. 675

GREAT COVE REALTY CO., INC., and DEVONSHIRE CONSTRUCTION CORP.,

Appellants,

against

HARRY C. BRENNER, District Attorney of the County of Suffolk, and TRUSTEES OF THE SHINNECOCK INDIAN TRIBE,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL

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Appellants will not burden this Court with a repetition of what is set forth in their Jurisdictional Statement, but will instead confine themselves to the contentions advanced in appellees' affidavit and brief in support of their motion to dismiss this appeal.

I.

As to the Jurisdiction of This Court.

Appellees have in no way answered the showing made in appellants' Jurisdictional Statement (pp. 12-14) that the questions presented by this appeal with regard to the jurisdiction of the New York State Courts were timely raised, under the decisions both of this Court and of the New York

Court of Appeals, (a) on the motion for reargument in the Court of Appeals following the initial decision by that Court, (b) on the motion for reargument in the Appellate Division following that Court's decision on the remand from the Court of Appeals, and (c) on the subsequent motion for leave to appeal in the Court of Appeals, and that by their denial of those motions the State Courts necessarily decided the questions adversely to appellants' position.

Appellees (Br., pp. 8-10) urge that appellants expressly waived any question of jurisdiction at the trial in the County Court. That claim, however, is completely without merit. It was thus pointed out in the very opinion rendered by the majority of the New York Court of Appeals in this case, on which appellees rely, that "it is well settled that parties may not by their consent confer jurisdiction over the *subject matter* on a court" (*Matter of Brenner* v. *Great Cove Realty Co.*, 6 N. Y. 2d 435, 442).

That Court then went on to hold that appellants had waived their right of trial by jury, differentiating between that right and the right to raise the objection of lack of jurisdiction over the subject matter (*id.*, 6 N. Y. 2d at 442-3). The questions presented by this appeal, however, directly concern the issue of jurisdiction over the subject matter, and it is undisputed that under New York law an objection of that kind is never waived and can be raised at any stage of the litigation (see *Matter of Brenner* v. *Great Cove Realty Co.*, *supra*, 6 N. Y. 2d 435, 442; see also cases cited in applts.' Jurisdictional Statement, pp. 12-13).

II.

As to the Substantiality of the Questions Presented.

Appellees (Br., pp. 8, 10-11, 14) contend that the questions presented by this appeal "are not novel or new, since they have been determined by his Court heretofore." That position, however, is not a tenable one, and is in no way supported by the cases cited by appellees.

Appellees' reliance on this Court's decision in *State of New York* v. *Dibble*, 62 U. S. 366, 21 How. 366, 16 L. Ed. 149, is completely misplaced. As is shown in appellants' Jurisdictional Statement (pp. 15-21), that decision upheld the validity of an earlier version of Section 8 of the Indian Law on the basis of a narrow interpretation of the statute by the New York State Courts under which its application was limited to intrusions on lands *indisputably* owned by an Indian Tribe. This Court there held no more than that the statute, *as so interpreted*, was a valid exercise of the State's police power for the preservation of the peace. The rationale of this Court's decision in the *Dibble* case, *supra*, is, however, here inapplicable, in view of the greatly broadened scope accorded to the statute by the changed interpretation applied in this case by the New York Court of Appeals.

The case of *Seneca Nation of Indians* v. *Christie*, 160 U. S. 283, 40 L. Ed. 970, 16 S. Ct. 828, on which appellees also rely, is similarly not in point. All that this Court there held was that no Federal question was presented by the decision of the New York Court of Appeals in that case that an Indian Tribe which chose to avail itself of a special state statute permitting it to bring an action of ejectment could do so only subject to the time limitations specified in the governing statute (160 U. S. at 289).

The case of *St. Regis Tribe* v. *State of New York*, 5 N. Y. 2d 24, cert. den. 359 U. S. 910, is likewise not in point, since the action there involved was brought after the effective date of 25 U. S. C., Section 233, enacted in 1950 (see applts.' Jurisdictional Statement, pp. 5-6).

The matter quoted in appellees' brief (pp. 14-15) from *Williams* v. *Lee*, 358 U. S. 217, 221, Note 6, similarly refers only to the grant of jurisdiction given to the State Courts by Congressional statute (citing, *e.g.*, 25 U. S. C., § 233), thereby recognizing the paramount jurisdiction of Congress in this area.

Appellees (Br., pp. 11-13) further make the unsubstantiated claim that the Shinnecock Indian Tribe has never been subject to Federal jurisdictional supervision, and that 25 U. S. C., Section 233, was intended only to apply to seven other Indian Tribes and not to the Shinnecock Tribe. It is clear, however, that the paramount authority of the Federal Government extends to all Indian Tribes in New York, as well as to those elsewhere in the country (see applts.' Jurisdictional Statement, pp. 22-24).

There is nothing in the applicable decisions or in the Congressional Committee Reports accompanying the bill which culminated in 25 U. S. C., Section 233, to support appellees' claim that the Shinnecock Tribe is not subject to Federal jurisdiction or that it was excluded from the scope of that enactment. Indeed, as is pointed out in the Senate Committee Report (quoted in applts.' Jurisdictional Statement, pp. 22-23), the provisions embodied in 25 U. S. C., Section 233, were deemed necessary even though it was recognized that "The Indian reservations in the State of New York have never been owned by the United States", "were not set up under any treaty made with the United States", and "were not set up under any act of Congress or Executive order", and that the State of New York had exercised "its wardship over these Indians". (See Report No. 1836 of Senate Committee on Interior and Insular Affairs, 81st Cong., 2nd Sess., June 15, 1950, p. 2.)

CONCLUSION

The questions presented by this appeal were timely raised and are properly before this Court, and are substantial and of public importance; and the motion to dismiss this appeal should be denied.

Respectfully submitted,

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